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Vol. III

TRANSCRIPT OF RECORD

(Pages 1699 to 2402)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 55

UNITED STATES, APPELLANT,

vs.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

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THOMAS H. BEACOM, called as a witness on behalf of General Motors Corporation, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination:—(continued)

By Mr. Owens:

Q. Mr. Beacom, yesterday you testified with respect to problems that you believe would be encountered in administering trusts of which your bank is fiduciary, as trustee or co-trustee, particularly with reference to the method of allocating the General Motors dividends that would be received upon the du Pont stock held by those trusts.

I want to ask you—I don't know if we got it clear yesterday—in considering what those problems were, whether you differentiated the problems that would be created depending on whether or not the General Motors dividend was paid out within the normal du Pont dividend. That is to say, it would be part of the regular du Pont dividend which would be paid in General Motors stock, rather than in cash. Did you differentiate the problem that would be created?

A. I don't recall that I made any particular distinction on that. I was addressing myself to the practical aspects of the broad general problem that we would have with the——

Q. In connection with the studies you made, as the basis for your testimony with reference to those problems, did you consider that?

A. Yes.

[fol. 1840] Q. And did you come to any differences in conclusion with respect to whether there would or would not be a problem?

A. Well, there would be a difference in degree, perhaps, but not in kind.

Q. I understand you are a lawyer, is that correct, sir?

A. Well, I studied law. I am not a practicing attorney.

Q. Is it fair to say that you are unable to draw for us the distinction between the problems that would be created depending on whether the GM dividend was paid within the current dividend of du Pont or was paid out on top of the regular du Pont dividend?

A. I don't—I am not prepared to say what the answer would be, what the solution would be in all these accounts.

They would all require the same preliminary analysis and the decision made with respect to the individual accounts might differ depending upon the amount and the components of any dividends that du Pont declared.

Q. Now, in connection with your testimony, did you examine particular trust instruments and the language to see whether or not the problem was resolved by the language of the trust instrument itself?

A. Not at this stage.

Q. You have not made such an examination?

A. I haven't personally made any examination of the individual accounts. I merely stated yesterday, and I repeat it now, that each account would have to be examined carefully.

I made, I think, also the point that by the time those accounts were all examined, action, if delayed, would have been or could be detrimental to the accounts, if it were too long delayed.

Q. In administering trusts, Mr. Beacom, you commonly encounter legal problems, do you not?

A. Oh, yes.

[fol. 1841] Q. When you perceive that a legal problem has arisen, do you normally undertake to have it examined by counsel for the purposes of making a determination?

A. Well, let me give you an analogy, if I may——

Q. I wish you would answer my question, sir.

A. Will you repeat it, then, please?

Q. I say normally when you perceive that a legal problem is involved, do you undertake to have it examined by counsel for the purposes of obtaining a determination?

A. At some point, not necessarily the first time we hear the question.

Q. But you have done that with reference to the accounts administered by your bank with reference to this problem, is that right?

A. I have not made an examination of the 879 accounts.

Q. Have you had counsel make an examination of those particular trusts?

A. No. We have outside counsel on many of them.

Q. Have you requested them to make an examination of those accounts?

A. I know from my experience that the problem is there.

Q. You know that there is a problem there?

A. Yes. At this point, I am not prepared to say what the answer is.

Q. Have you encountered this type of problem before?

A. Yes.

Q. In reference to what stock?

A. Well, let me give you what I thought of a moment ago as an analogy as to the kind of practical problem that confronts us.

When it was determined that the people concerned with the trusts could with tax advantage in some cases release their powers of appointment. Now, that was publicized. It was in the paper for anyone to read that was aware of it. [fol. 1842] For us to have read all of the instruments and to have notified the people that might be affected by it or that possibly had powers to exercise, and ask them to determine what they wanted to do, if we had waited the length of time required for that examination, it would have been too late for them to take effective action.

We therefore sent out a broadside. That included, in a dragnet operation, people that came in to find out if their account was affected.

At that point we didn't know, and even if we had an opinion, we then had to refer to outside counsel in many cases.

Now, that is a situation that I tried to describe that is going to arise here, that type of thing. From an administration standpoint, it is going to be a problem.

Q. Do you perceive that it is a real difficult problem to examine those trust instruments to determine, at least, how substantial a legal problem may be involved and what amount of time would be involved in solving such a problem?

A. No, because as an administrative man, I know the problem will be there. It is premature now to examine them, and if we form an opinion as to what the answer is, which is the only thing I would be concerned about, we would then be thrown into consultation with other people, other counsel. Outside attorneys would have differing opinions to how it would affect their particular trusts. I think it is premature at this point to go into that kind of analysis.

Q. Well, as a lawyer, you recognize that a lot of problems you think may be involved are often dissipated when given closer examination?

A. Why, yes. I could give you an example.

[fol. 1843] Q. Just answer the question. You recognize that, do you not?

A. Certainly.

Q. You also testified that you have not had occasion to refer particular trust instruments to lawyers for determination on this point?

A. I beg pardon?

Q. I understand you to say that you have not to this point referred those trust instruments to lawyers for determination on the point?

A. No, not as a matter of routine procedure.

Q. You anticipate that there may be a problem——

A. I know there will be a problem. We have had conversations about them.

Mr. Tierney: If the Court please, I think counsel has pursued this—beat it to death, almost. Mr. Beacom has testified innumerable times that there will be a multiplicity of problems here. We will concede or make a stipulation, if you want to, that there will be very many problems in connection with these trusts.

I see no point in pursuing it further.

Mr. Owens: If the Court please, I am trying to undertake to establish the basis for this witness' opinion as to what the extent of these problems are and what his acquaintance is with the trust instruments and their language and how they give rise to such problems.

Now, if he has made a considerable examination of this question, that is one thing. If it is just his opinion that there may be problems involved, the weight of his testimony is entirely different.

The Court: State the question.

[fol. 1844] By Mr. Owens:

Q. Did any trust accounts of your bank hold stock in the New York Central Railroad?

Mr. Tierney: I object to that; wholly irrelevant. How is that relevant?

The Court: What is the materiality?

Mr. Owens: I think it will become evident, your Honor, if I am permitted to ask a few questions on it.

The Court: All right. You may answer.

By the Witness:

A. I presume so. I can't answer of my own knowledge and whether we still have it or not. I know we have had it.

By Mr. Owens:

Q. Do you know whether or not the Central Railroad has from time to time paid dividends in stocks of other corporations?

A. It isn't one of the examples I would have thought of. Perhaps it has. I don't recall that.

Q. I would like to ask you whether you recollect the payment by the Central Railroad of a dividend to its stockholders, dividends paid in the stock of the Reading Company?

A. The Reading Company?

Q. Reading.

Mr. Tierney: What is the question? Did you ask him if he remembers it?

Mr. Owens: If he is acquainted with the New York Central's declaration of a stock dividend in the stock of the Reading Railroad.

Mr. Tierney: I can't see where that has any relevance. I object to the question on that ground.

The Court: Overruled. He may answer.

[fol. 1845] By the Witness:

A. I do not remember.

By Mr. Owens:

Q. I have here a newspaper clipping, Mr. Beacom, taken from the New York Times of November 1st, 1957. That newspaper article reports, in part, as follows, and I will ask you to follow me on this——

Mr. Tierney: I object to reading into this record any reports from the New York Times that are not in evidence here.

The Court: Sustained.

By Mr. Owens:

Q. Do you know whether or not your trust company had any—Do you recollect any problems in connection with the payment by the New York Central Railroad of Reading stock?

Mr. Tierney: Same objection.
The Court: Overruled.

By the Witness:

A. Do I recall any problems on that?

By Mr. Owens:

Q. Yes, sir.

A. If there were problems, they did not come to my attention, that I recall, and they doubtless were of miniscule importance compared to this one.

Q. Well, the legal problems, do you see any reason that the legal problems would be different than the legal problems encountered here, sir?

Mr. Tierney: I object to that, your Honor.
The Court: Sustained.

[fol. 1846] Mr. Owens: If your Honor please, he is testifying with respect to legal problems that he anticipates the Government's proposed judgment would create. I am asking him now if he can recollect whether they had similar legal problems in a similar stock distribution in the past.

Mr. Tierney: He already said he did not know.
The Court: The ruling stands.

By Mr. Owens:

Q. Do you have any recollection of the treatment of dividends by Standard Oil of Indiana paid in Standard Oil of New Jersey stock?

A. Yes, I have got a recollection of that.

Q. Do you have a recollection of legal problems in that connection?

A. Well, the——

Q. In making distribution between the income and the remaindermen, income beneficiaries?

A. I know what we generally do in respect to it, yes.

The problem has come up but in most cases the amount that is distributed by the Standard of Indiana in the form of shares in Standard of New Jersey is not important enough to make a serious legal issue out of it.

There are conferences with co-trustees, there are differences with beneficiaries and life tenants that have occurred in discussions that have been had, but that is not a serious problem.

Q. Not a serious problem?

A. No, because the amount involved, the magnitude of the distribution, is unimportant.

Q. Do you know how that magnitude of that dividend has varied over the years?

[fol. 1847] A. Oh, I am not positive in my recollection, but it has been 1, 2 per cent, seldom more, or perhaps at one time or another 3. I do not think more than that.

Q. Well, do you know of any litigation that that has led to?

A. We have not had any.

Q. Pardon?

A. We have not had any.

Q. Mr. Beacom, in connection with your preparation for your testimony in this cause, have you had cause to examine the experience of the court-decreed divestiture of Aluminium Limited stock?

A. No, I have not.

Q. You have no acquaintance with that divestiture——

A. No.

Q. (Continuing)—pursuant to Court order?

A. No; only superficially.

Mr. Tierney: No redirect, your Honor.

Mr. Owens: Just a moment.

By Mr. Owens:

Q. Mr. Beacom, have you made any studies in connection with any variations of the proposed divestiture in this case?

A. Have I——

Q. Have you made any studies in connection with any variations of the proposed divestiture in this case?

Mr. Tierney: I object to the form of that question, your Honor. It is vague and indefinite.

The Court. Sustained.

By Mr. Owens:

Q. Do you perceive, Mr. Beacom, that there would be any advantage in distributing this stock in a single year as against over a ten-year period?

Mr. Tierney: I object to the form of that question, too. It is indefinite. What would be distributed?

[fol. 1848] Mr. Owens: Pro rated to the stockholders of du Pont.

The Court: Overruled.

By the Witness:

A. May I have the question against? I thought you said——

By Mr. Owens:

Q. Do you perceive of any advantage in distributing General Motors stock to the du Pont stockholders in a single year as against spreading it over a ten-year period?

A. Well, if there is any advantage in getting hit in the head real hard once, it would have that advantage, instead of being hit ten times.

Q. Well, from a tax standpoint, do you perceive of any advantage or disadvantage?

A. The tax would be——

Mr. Tierney: If the Court please—well, I withdraw it.

By the Witness:

A. The tax would be approximately the same burden if spread over ten years as if it were distributed in one year, except the one year effect would be to throw many people into a higher bracket.

Q. Do you know what percentage of the distribution would be taxable if it were distributed in one year as against ten?

A. I have not paid any attention to that.

Mr. Owens: No further questions.
Mr. Tierney: No redirect.
The Court: That is all.
Mr. Owens: Excuse me a minute.
That is all.

(Witness excused.)

[fol. 1849] Mr. Cox: We call Neil H. Jacoby.

Neil H. Jacoby, a witness called on behalf of the defendant, E. I. du Pont de Nemours & Company, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Cox:

Q. You are Neil H. Jacoby?
A. I am.
Q. Where do you live?
A. I reside at 1430 Midvale Avenue, Los Angeles 24, California.

The Court: Would you please keep your voice up?
Mr. Cox: Perhaps that microphone should be closer.
The Court: What was the address?
The Witness: 1430 Midvale Avenue, Los Angeles 24, California.

By Mr. Cox:

Q. You are Dean of the Graduate School of Business Administration at the University of California in Los Angeles?
A. I am.
Q. Are you also a professor in that university?
A. I am.
Q. Where were you educated, Dean Jacoby?
A. I received a degree of Bachelor of Arts in Economics from the University of Saskatchewan, in Canada, and thereupon I took up graduate studies in economics at the University of Chicago.

I received a degree of Doctor of Philosophy from that institution.

Q. When did you receive a Ph.D., if you recall?

A. In 1938.

Q. And what did you do after that, Dean Jacoby?

A. After that I became an assistant director of finance of the State of Illinois.

[fol. 1850] Q. How long did you hold that position?

A. Approximately three years.

Q. What did you do after that?

A. Following that I returned to the University of Chicago as an assistant professor of finance and remained with the University of Chicago, advancing to the rank of professor and later vice-president, over the period 1938 to 1948.

Q. You resided in Chicago?

A. I resided in Chicago during those years.

Q. While you lived in Chicago, were you connected in any way with any investment banking firm?

A. For approximately a year I was manager of the Research Department of a firm then known as Lawrence Stern and Company investment bankers.

Q. And did a time come when you left the University of Chicago, Dean Jacoby?

A. I left the University of Chicago in January of 1948 to become affiliated with the University of California at Los Angeles, and I have been a member of its faculty and administrative officer ever since.

Q. Have you been continuously at the University of California since that time?

A. No sir. I have taken leave on several occasions. I took leave during the period of August, 1953 to March of '55 to serve under appointment by President Eisenhower as a member of his Council of Economic Advisers.

I took a brief leave in the autumn of '55 to serve as American economic adviser to the government of India, and I took a six-month leave during the last six months of 1957, as I recall, to serve as the United States representa-[fol. 1851] tive in the Economic and Social Council of the United Nations in New York and in Geneva.

Q. You referred, Dean Jacoby, to your service as a member of President Eisenhower's Council of Economic

Advisers; is that the Council that is appointed under the provisions of the Employment Act of 1940?

A. The Employment Act of 1946.

Q. 1946?

A. Yes.

Mr. Cox: In that connection, may it please the Court, I should like to direct the Court's attention to the provisions of Title 15, U. S. Code, Section 1023, which reads as follows:

> "There is created in the executive office of the President a Council of Economic Advisers, hereinafter called the Council. The Council shall be composed of three members, who shall be appointed by the President by and with the advice and consent of the Senate, and each of whom shall be a person who, as the result of his training, experience, and attainments, is exceptionally qualified to analyze and interpret economic developments, to appraise programs and activities of the Government in the light of the policy declared in Sections 1021 of this Title, and to formulate and recommend a national economic policy for appropriate employment production and purchasing power under free competitive enterprise."

You were one of the three members of that Council for the period of time mentioned, were you not?

A. Yes, sir.

Q. Are you the author of any publications in the field of economics and finance?

A. Yes, I am the author or co-author, I dare say, of about a dozen books or monographs, and perhaps 70 or 100 articles [fol. 1852] that have been published in professional journals.

Q. Have you finished your answer?

A. I have finished.

Mr. Cox: I should like to have a document now marked for identification. I propose, instead of taking time to go through these publications, simply to incorporate in the record, if there is no objection, a bibliography of the publications by Dean Jacoby.

Mr. Reycraft: No objection.

Mr. Cox: This is du Pont exhibit for identification 37.

(Thereupon said document was marked Defendant du Pont Exhibit No. 37 for identification.)

By Mr. Cox:

Q. Dean Jacoby, do you have before you a copy of the bibliography that has been marked du Pont Exhibit 37 for identification?

I will hand you a copy. Was that bibliography prepared under your supervision and direction?

A. Yes, it was.

Q. Is it an accurate statement of your publications?

A. I believe it is.

Q. While you were serving, Dean Jacoby, as a member of the President's Council of Economic Advisers, did you have occasion to perform any duties in connection with any reports that were submitted to Congress?

A. Under the Employment Act of 1946, it was the responsibility of the members of the Council of Economic Advisers to assist the President in making his annual Economic Report to the Congress, and I did so assist him.

Q. For what years?

A. For the years 1954 and 1955.

Q. Dean Jacoby, were you asked by the du Pont Com-
[fol. 1853] pany to make a study of the economic and financial consequences that might be expected to follow from the adoption and execution of the proposed judgment that has been filed in this Court by the Government?

A. Yes, I was.

Q. Did you make such a study?

A. I did.

Q. As a result of that study, have you formed any opinion as to the economic and financial consequences that might be expected to follow if this proposal for divestiture of the common stock of General Motors that is owned by du Pont, Christiana and Delaware, should be adopted and put into effect?

A. I have formed certain opinions.

Q. Now, for the purposes of the study that you made, Dean Jacoby, what did you assume to be the essential features of the Government plan?

A. Well, I assumed that the essential features of it were,

in the first instance, that du Pont should divest itself of all of the 63 million shares of General Motors stock which it owns, over a 10-year period, and that Christiana securities must dispose of the 535 thousand odd shares which it owns over the same period, and that of the 63,535,000 shares involved, approximately 20 million shares, which are either owned by Christiana, or which may be attributed to Christiana or Delaware or their shareholders as a result of their stock holdings in du Pont, must be sold by a trustee appointed by the Court, and the balance of the shares are to be distributed directly to the stockholders of du Pont. And I understand further that the plan of divestiture proposed by the Government would involve the distribution of approximately 1.38 shares of General Motors stock to the holder of each share of du Pont stock over this period; and that the market value of the General Motors stock [fol. 1854] coming into the hands of the du Pont stockholders has, under ruling of the Director of Internal Revenue, been treated as ordinary income and would be taxed to the recipient as ordinary income.

Q. Have you read that ruling of the Internal Revenue Service, Dean Jacoby?

A. Yes, I did read that ruling.

Q. Now on the assumption that the plan containing the essential features that you have described should be adopted and put into execution, in your opinion what courses of action would be open to a du Pont stockholder?

A. Broadly speaking, it appears to me that the du Pont stockholder would be faced with a choice between four courses of action or combinations of these courses. He might either elect to retain his stock; he might elect to sell his stock; he might choose to give his stock, either in trust to the members of his family or perhaps to an educational or charitable institution; or, in the fourth instance, he might elect to organize a personal holding company and transfer his du Pont stock to this holding company in exchange for stock in the holding company.

These are four general alternatives with which we would be confronted as a result of the impending execution of the Government plan.

Q. Have you considered what considerations might bear upon the stockholder's choice of one or another of these courses of action?

A. Yes, I have. The factors involved are quite numerous.

If the du Pont stockholder should continue to hold his stock, he would of course be faced with the need for paying income taxes on the market value of the stock so received [fol. 1855] at rates ranging from, roughly, 20 per cent to 92 per cent.

I am referring here both to Federal and State income taxes.

And if he happened to be a person with a low marginal tax rate, that is, the highest bracket rate for which he were liable were low, of course the tax burden would be less than it would otherwise be, and he might elect to hold the stock, particularly if the selling pressure generated by the plan had forced the price down to a point where a sale did not seem attractive to him.

I should say that other things being equal, continuing to hold the stock would be, of course, most likely to be pursued by a stockholder with a low marginal income tax bracket or a stockholder whose ownership of du Pont shares represented a relatively small fraction of his investment assets, or a stockholder whose income from du Pont dividends represented a relatively small fraction of his total income. These would be the circumstances in which holding the stock would be likely to be the best alternative.

Q. Have you considered the position of the du Pont stockholder who was in a relatively high marginal income tax bracket?

A. Yes, I have; and the stockholder in a relatively high marginal bracket, or the stockholder whose holdings of du Pont shares bulk large in his total assets, or whose income from du Pont dividends bulks large in his total income, would be faced with the prospect of having to pay annually very considerable amounts of taxes to the Government on the General Motors shares he receives, and he would be under rather strong incentives to sell his du Pont shares in order to avoid these taxes.

Q. What assumption, if any, Dean Jacoby, have you made [fol. 1856] with respect to the tax consequences that would be incurred by a shareholder who sold his du Pont stock?

A. Well, a shareholder who sold his du Pont stock would of course not escape taxation; he would be liable for a capital gains tax, if the sale price of the stock exceeded his

cost or other basis; and for a du Pont shareholder whose shares were acquired many, many years ago, at a relatively low cost or basis, the capital gain would be comparatively large and the tax he would have to pay would be a considerable factor. And here, again, he would be obliged to balance the taxes paid against the market price of the du Pont stock as it existed at the time. If it had been forced down to a low level, he might conclude for investment reasons that it ought to be held; on the other hand, he might conclude that it might go lower and sell it.

Q. I think in your answers you have dealt in substance with two of the possibilities that are open to a du Pont shareholder, in your opinion, one to hold the stock, the other to sell it. You mentioned a third possibility. Can you tell me what considerations would bear upon the stockholder's decision whether to follow that possibility?

A. Well, the third possibility, as you mentioned, would be to transfer the stock or give it to a trust for the benefit of his children or members of his family or others, or to give it to an educational or charitable institution. In either case, the effect would be to reduce tax liability. If he gave it to members of his family, in lower tax brackets, this would avoid a certain amount of the tax that would otherwise be due. If he gave his du Pont stock to an educational or charitable institution, which has a zero tax rate, of course the tax liability would be completely avoided, and the donor of such du Pont shares is able to regard the cur-
[fol. 1857] rent market value of the shares as a charitable deduction, and this course of action would not only enable him to avoid any tax on the capital gains or the ordinary income represented by the General Motors stock, which would have been received otherwise, but it might also enable him to reduce his taxes on other income. In any case, of course he is parting with a valuable asset.

Q. He is escaping tax liability by giving away an asset?

A. That is right.

Q. Now you mentioned the fourth possibility, if my memory is correct, that had to do with the formation of a personal holding company. What considerations bear upon that choice?

A. Well, this is a fourth course of action open to a du Pont stockholder to transfer his stock to a personal holding

company and take shares in the holding company in exchange for it.

If that step were taken, as I understand the tax laws, then the annual distribution of General Motors stock, which would be valued at du Pont's cost, I believe averaging $2.10 a share, plus the dividends on the du Pont stock received, would be taxed to the holding company at the regular corporate rate.

Now, for a du Pont stockholder in a very high marginal tax bracket, this course of action might reduce his taxes. However, the expenses of organizing and operating such a holding company are not inconsiderable, and I am informed that the tax status of such a holding company is not entirely clear.

I would conclude that this course of action would be a feasible one only for probably the relatively few very large holders of du Pont stock.

[fol. 1858] Q. Dean Jacoby, in your opinion, does the impact of the proposed Government plan differ materially as it bears upon different categories or classes of du Pont stockholders?

A. Yes, indeed it does.

As I hope I made clear in my preceding statement, the impact differs very greatly indeed. In fact, the financial inequalities of the execution of the plan upon different du Pont stockholders appears to be to me one of the greatest weaknesses of the plan.

Q. In general where would the adverse impact be relatively greatest, other things being equal.

A. The impact would be relatively greatest for stockholders with the highest marginal Federal income tax rates; for stockholders who have relatively the largest fraction of their assets, investment assets, in du Pont; and for stockholders, the largest fractions of whose income is represented by dividends on du Pont. They would bear the main brunt of it.

Other stockholders, of course, would be less burdened. I think it might be pointed out further that the stockholders faced with the heaviest tax liabilities would be under the strongest incentive to dispose of their du Pont shares, to sell them, and this would drive the price down and at some point the low taxed or untaxed holders of du Pont shares might find them attractive, and they would enter the mar-

ket on the buying side. They would certainly be under less incentive to sell.

We could look forward under the Government plan with some confidence to a certain amount of transference of shares from those on whom the tax impact is very great to those on whom it is relatively less.

Q. In your opinion, Dean Jacoby, would the adoption and execution of the proposed Government plan create any substantial selling pressure upon du Pont shares in the [fol. 1859] security markets of the United States.

A. Yes, I believe it would create a quite important net selling pressure.

Q. Let me ask you this question, Dean Jacoby: On the assumption that the Government plan, as you understand it, should be adopted, in your opinion what kind of alternative dividend policies would be open to du Pont Company so far as its procedure under that plan is concerned?

A. It appears to me that if the Government plan were to proceed, that the du Pont Company would be confronted with a need for choosing one from among three broad types of dividend policies.

Q. What are those three policies to which you refer?

A. One policy would be to continue to pay the historical cash dividend, which I believe was $6.00 a share in 1958, plus approximately a tenth of the General Motors shares distributed in the years.

If we take a post-plan value of, let's say, $40.00 a share for General Motors, I believe it is true that a complete distribution of G.M. shares would equal the historical cash dividend payment for about eleven years, or an annual distribution of about a tenth more than the historical cash dividend in G.M. shares would completely distribute the shares in ten years.

Q. Is that the first dividend policy?

A. The first dividend policy which I think is helpful to identify for our purposes of analysis is a policy of paying the historical cash dividend plus G.M. stock.

Q. What would be the second policy which you referred to?

A. The second type of policy would be to discontinue paying any dividends in cash and to pay a dividend entirely in General Motors shares. As I have pointed out, this would

involve the payment each year of slightly more than the historical amount of value in cash.

[fol. 1860] Q. That computation you made a moment ago, then, is really a computation that relates to the second dividend, not to the first?

A. To the second dividend policy, yes, sir.

Q. I think you said there was a third alternative policy. What is that policy?

A. The third type of policy would in essence be a compromise between Policy 1 and Policy 2. In other words, it would involve the payment of about a tenth of the General Motors shares each year to the du Pont stockholders plus a relatively small amount of cash, less than the historical cash dividend.

Q. Let me then, Dean Jacoby, direct your attention to the first of these dividend policies that you have described; that is to say, the policy under which du Pont might continue to pay annually a cash dividend equivalent to the historical cash dividend it has been paying, plus approximately one-tenth of the total General Motors shares to be distributed under the plan.

That is the first dividend policy, is it not, that you described?

A. Yes, it is.

Q. Now, in your opinion, what would be the economic and financial consequences to du Pont of the adoption of that policy?

A. I believe that the adoption of that dividend policy by the du Pont Company would result in a serious depression in the market value of its stock over the period of the plan, the ten-year period.

Q. What are your reasons for that opinion?

A. My reasons for this opinion are that under this dividend policy, the price of du Pont stock would be depressed both because of the tax penalty imposed on the shareholders of du Pont, and also because of what I call an earnings-loss factor, a loss of earnings asset by the du Pont Company.

[fol. 1861] Q. In connection with your answers, Dean Jacoby, let me ask you whether, in the course of your study, you made any investigation of the dividend pay-out ratio of du Pont Company in any past period of time?

A. Yes, I did examine that subject.

Q. What did that examination disclose to you?

A. Well, it disclosed to me that the dividend pay-out ratio of the du Pont Company has been relatively high compared with American business corporations as a whole.

I think it has averaged about 78 per cent of total earnings, including the income received by du Pont from General Motors stock over the past ten or eleven years.

It disclosed further that approximately 30 per cent of du Pont's earnings in this last decade have come from General Motors, in dividends on du Pont's holdings in General Motors, and that the aggregate pay-out to du Pont stockholders has, therefore, represented considerably more than du Pont's earnings from its own chemical business.

Q. In connection with your consideration of this particular point, did you consider any comparison between the average annual rates of growth in plant and property as between du Pont and other chemical manufacturers?

A. I did make some inquiry into that matter, and I found that while du Pont is still the largest American chemical manufacturing company, the rates of growth of a number of other chemical companies in the last decade have exceeded the rate of growth of du Pont.

Q. You mentioned a moment ago a factor that you described as a factor related to a decrease in earning power.

Have you made any estimate as to what reduction would [fol. 1862] occur under this dividend policy over a ten-year period in the earning power of du Pont?

A. Over a ten-year period, it is clear that divestment of the General Motors stock completely would reduce du Pont's earning power by approximately 30 per cent, other things remaining the same.

Q. Now, leaving for the moment this dividend policy number 1, which I may wish to ask you some more questions about, but for the moment let me direct your attention to Policy No. 2. Do you remember that dividend policy?

A. Yes, I do.

Q. Now, what would be, in your opinion, the consequences to the du Pont Company of the adoption of Policy No. 2?

A. This would be a policy of substituting General Motors stock for cash entirely, and as compared with the first policy, the policy of the historical cash dividend plus stock,

it would have, it seems to me, certain drawbacks and certain advantages.

It would be advantageous to du Pont in the sense that it would avoid a reduction in du Pont total earning assets because du Pont would be accumulating cash because of the fact that it was distributing only General Motors shares.

There would be an advantage to the du Pont shareholder of this dividend policy to the extent that his tax bill, his federal income tax liability, would not increase. He would be receiving the same ordinary income in the form of General Motors shares that he otherwise had received in cash.

But, on the other hand, this dividend policy would mean the accumulation by du Pont of huge amounts of cash for which the company would be obliged to try to find profitable avenues of investment.

[fol. 1863] I believe that there would be uncertainty about the capacity of the company to find avenues of investment for this sum of money, which I think would amount to something like two and three quarter billion dollars over the ten-year period, that had been as profitable as this investment in General Motors had been.

Q. Have you considered, as a matter of economics, what possibilities there might be for the du Pont Company to invest that amount of money over the ten-year period and what problems would be created by an attempt to invest it?

A. Well, it appears to me that very serious problems are created, not only for the management of du Pont in finding profitable outlets for this huge sum of two and three quarter billion dollars, but also problems for the Government and the people of the United States.

If, for instance, du Pont should take this vast amount of money and expand its chemical manufacturing operations, it is evident that du Pont would greatly increase its total occupancy of the chemical market, and, being already the largest company, it might well become a very dominant company in the field and threaten competition.

On the other hand, if du Pont should elect not to use this cash in expanding its investments in the chemical industry but should invest in electronics or some other industry, it appears to me not unlikely that the same problems of alleged control of the markets of these industries for the

sale of its own chemical products might arise in that event.

So, in either case, this course of action confronts both the du Pont management and the people of the United States with problems.

[fol. 1864] Q. You mentioned a little while ago, Dean Jacoby, that this particular dividend policy under which the dividend would be paid entirely in stock would have the advantage to the du Pont shareholder that it would not increase his income tax burden.

Would there be in your opinion any disadvantage to the du Pont shareholder in this dividend policy which you have been discussing?

A. There would be a disadvantage with respect to the du Pont shareholder heavily reliant at the present time on cash dividends for his living expenses.

If he now received the equivalent in General Motors stock, presumably he would be obliged to sell part or all of his stock in order to pay his taxes and his living expenses. Under this dividend plan one could therefore predict somewhat greater selling pressure on General Motors than under Dividend Policy 1.

Q. Now, you mentioned a third dividend policy in your earlier answer. What in your judgment would be the economic and financial consequences of the third dividend policy?

A. Because the third policy I described represents in essence a compromise between dividend policies 1 and 2, and has a mixture of both the advantages and drawbacks of both, I should expect that the consequences for the market price of both du Pont and General Motors would fall intermediately between the consequences that would flow from policies 1 and 2.

Q. Now, in an earlier answer, Dean Jacoby, in expressing the opinion that the adoption of the proposed Government plan would have a depressing effect upon the market price of common stock of du Pont Company, you mentioned two factors. One you called the tax penalty factor and the other one you called a earnings loss factor.

[fol. 1865] Would you explain what you mean by the tax penalty factor and how you calculate it, if you did calculate it?

A. Yes. Assuming that du Pont pays its stockholders both the historical cash dividend plus General Motors

stock, the Government plan in effect would require du Pont to distribute to its stockholders a material fraction of its earning assets.

The plan also would involve the imposition upon those stockholders of what I think might be described in economic terms as a capital levy. It is legally described as income tax.

Accordingly, we can compute the tax penalty factor by finding in the first instance the percentage of the market value of du Pont's investment in General Motors to the total market value of the stockholders' investment in du Pont, and multiply that ratio by the weighted average rate of this capital levy or income tax that is imposed on the du Pont stockholders collectively.

The product of these two ratios gives us the percentage of the total market value of the du Pont stockholders' investment, which, in effect, is being expropriated by taxation.

Q. Have you made a computation of that kind?

A. Yes, I have.

Q. Will you describe that computation to the Court?

A. Well, I will. I would like to refer to these figures, if I may.

Q. You may.

A. I assumed in the first instance that we might take a fair market value of du Pont and General Motors common stock prior to the Government plan at $194 and $42⅝ per share respectively. These, I might say, are the average prices at which du Pont and General Motors shares traded [fol. 1866] during the three most recent calendar years 1956, '57 and '58 and they form the basis of succeeding calculations.

I then calculate the total market value of the du Pont Company at $9,110,801,000. This is arrived at by adding to the value of the preferred stock, which is $238,885,000, the figure of $8,871,916,000, which is simply the 45,604,000 odd shares of du Pont stock valued at $194 per share.

So we have a current market value of du Pont of nine billion, one hundred ten million dollars. I next calculate the market value of du Pont's investment in General Motors, 63 million shares times the price of forty-two and five-eighths dollars per share, which gives the value of the investment $2,685,375,000.

The ratio of du Pont's investment in General Motors to the total value of du Pont, both figured at market is, therefore, 29.47 per cent.

The next step is to find the weighted average rate of federal and state income taxes that will be paid by present du Pont stockholders upon this 29.47 per cent of their investment that would be returned to them. Now, here one must take into account the differences in the tax treatment of the various classes of du Pont shareholders.

Corporate shareholders and the tax-exempt institutional shareholders, of course, pay only nominal taxes or, in some instances, none at all, and I have neglected or ignored that entirely. I have assumed for purposes of this computation that the weighted average tax rate that will be paid by individual du Pont owners and beneficiaries will be 57.2 per cent.

This I may say is based on a direct survey of du Pont stockholders by National Analysts Company, that is to say, [fol. 1867] they estimate that 57.2 per cent is the weighted average tax that will be paid by all individual direct or beneficial owners of du Pont shares. Such shareholders own approximately twenty-five million, one hundred seventy-seven thousand du Pont shares.

A weighted average rate of 57.2 per cent applicable to these shares would be equivalent to a weighted average rate of 32.1 per cent applicable to the GM stock received on all shares, that is, spreading it over the corporate as well as the individual owners.

Now, of course, this is only federal income tax and I have added a factor of nine-tenths of one per cent or a weighted average state income tax——

Q. How did you arrive at that factor?

A. The state income tax?

Q. The state income tax, yes.

A. Well, I arrived at that factor by taking into account the income tax rates of the states of New York, Delaware, Connecticut, and California, all of which impose personal income taxes at rates ranging up to six per cent, and all of which are relatively important centers of residence of du Pont stockholders.

After allowing for the fact that the taxpayer can deduct his state income tax payment from income taxable under federal law, I believed it was reasonable to assume that the

weighted average imposition would be nine-tenths of one per cent.

Adding that to the 32.1 per cent weighted average federal rate we arrive at a combined federal and state weighted average income tax rate of 33 per cent of the income received.

Q. What is the next step after that computation?

[fol. 1868] A. The last step then is simply to multiply the 29.47 per cent of the total market value of the du Pont shareholders collective investment that is being returned to them by the weighted average rate 33 per cent, and we arrive then at the conclusion that the Government plan would appropriate through taxation 9.73 per cent of the entire investment in du Pont or, in round figures, ten per cent.

Q. That is the factor that you refer to as the tax penalty factor that would have a depressing effect upon the market price of du Pont?

A. Yes, it is.

From the standpoint of rational economic analysis ten per cent would be the measure of the reduction to be expected in the market value of du Pont shares, as a result of this tax penalty.

Q. As a result of the tax penalty factor computed as you have explained to us in the previous testimony?

A. Yes, sir.

Q. Dean Jacoby, let me ask you this question. In computing and reaching the conclusion that the tax penalty factor might, under the terms of your computation, reduce the value of the common stock of du Pont around ten per cent, did you consider at all, or to any degree, the extent to which the market price of du Pont stock might be depressed as a result of offers to sell the stock that might be made by persons who, because of their peculiar tax position, would find it to their advantage to pay a capital gains tax on the sale of du Pont rather than to pay income tax on the distribution of the General Motors shares?

A. No, I did not. I simply took into account the tax penalty.

Q. Did you consider the extent at all to which the market price of the common stock of the du Pont Company might be effected by offers to sell that might be made by trustees

[fol. 1869] who hold du Pont common stock for the benefit of others, and who might wish to sell in order to avoid the legal and administrative problems which they may face by reason of a distribution of General Motors stock? Did you consider that possibility at all?

A. Well, I am sure that selling pressure would emanate from that source and for that cause; but I did not here take that into account in calculating the reduction in the market price of du Pont as a result of the tax penalty factors which I have described.

Q. So your figure of ten per cent is simply calculated on the basis of what you have described and computed as a tax penalty factor?

A. That is correct, sir.

Q. And does not take into account any selling pressure that might arise from the other circumstances that I have put to you in my previous preceding questions?

A. It does not.

Q. Now so far I think you have been evaluating the depressing effect upon the price of du Pont shares in terms of what you have described as the tax penalty factor.

Let me ask you this question, Dean Jacoby. We will digress for the moment.

It has been suggested that the income tax that would be imposed on the distribution of these shares under the Government's plan is not really a penalty tax or capital levy, because only the amount of accumulated net profits of du Pont represented by the General Motors shares distributed to du Pont shareholders would be taxed as ordinary income.

Do you agree with that suggestion?

A. I believe that this is technically true; but the economically significant fact is that the accumulated profits of [fol. 1870] other business corporations are not being taxed, and that the evaluation by the investor, therefore, is one that involves a comparison of one stock, du Pont, where the tax applies, with others, where it does not apply; and that therefore, from an economic standpoint, this is indeed a tax penalty.

Q. Now let me return—before I do that, let me ask you this question, Dean Jacoby, to make sure that I understand it.

You recall I asked you whether you had taken into account in computing your 10 per cent figure any selling

pressure that might be exerted against the price of du Pont common stock by reason of sales by individual stockholders who found it to their financial advantage to sell because of their tax position, or by reason of sales by trustees; and I think you told me you had not taken that into account.

If any selling pressures should be generated by reason of those circumstances, am I to understand that that impact upon the price of the common stock of the du Pont Company would be in addition to and is not included in the 10 per cent figure that you have computed? Is that correct?

A. Any selling pressure generated by other reasons than tax liabilities, such as the problems faced by trustees, or speculative selling, other factors, have not been taken into account in my calculation and would be in addition, yes, sir, to the tax penalty factor which I have described.

Q. Now let me return to the chain of my direct examination.

You mentioned also the factor which you described as the [fol. 1871] earnings loss factor, and I think you told us that you had estimated that at 30 per cent on the basis of the computations you explained to us earlier over a 10-year period, is that correct?

A. At the end of the 10-year period, it would accumulate to 30 per cent. At the beginning of the period, of course, it would be less.

Q. Dean Jacoby, have you considered whether this, roughly, 10 per cent tax factor figure which you have described as having an impact on the price could be reduced at all, or would be reduced at all by a shifting of the ownership of du Pont shares from high tax to low tax, or tax-exempt holders of the stock? A. Yes, I have considered that matter.

The depression in the market price of du Pont stock because of the tax factor would be 10 per cent, assuming the present structure of ownership of du Pont shares. Now, theoretically, it is possible that a shift in the structure of ownership might reduce that factor. The extent to which that shifting might occur, of course, will depend on quite a number of factors, and I think they may be summarized in the assertion that they will depend on the degree of elasticity of investment demand for the du Pont stock, by which I mean the relative increase in the rate of purchase

of shares for investment purposes in response to a small relative decline in the price of these shares.

Q. Do you have a view on what the relative degree of elasticity of the demand for du Pont stock may be?

A. I have considered this, and in my opinion it is not relatively high; that is, the demand for du Pont stock is not highly elastic.

One reason for forming this opinion is that I observed that corporate owners of du Pont stock, other than Chris- [fol. 1872) tiana and Delaware, hold less than one-tenth of the outstanding du Pont stock; and further, that owners of 100 shares or less, that is, relatively small owners of du Pont stock, account for only about 13 per cent of the du Pont stock ownership.

Q. Will you explain to us why you think that circumstance indicates or has any bearing on the degree of elasticity of demand for the stock?

A. I think it has this bearing, sir: the fact that a comparatively small fraction of the du Pont stock has been held by corporate owners other than Christiana and Delaware, or by small stockholders, who are the low-taxed persons, presumptively, indicates that for one reason or another du Pont shares have not been eagerly sought by these kinds of investors and that it would require more than a small drop in the price of du Pont stock to bring them into the market, on the buying side.

Another factor that I have taken into account is that the present structure of ownership of du Pont shares does not exist by accident; du Pont has had its shares in the market for a great many years, and the distribution of ownership that we see today reflects the results of laws governing investment and investment policies and habits that are not very quickly changed. Therefore, it is my opinion that the amount of shifting in the du Pont stock ownership from relatively high-taxed to low-taxed, or zero-taxed hands, would not be great, and that therefore the reduction of this 10 per cent tax penalty factor that would occur by virtue of such shifting would not be very great.

A third factor that I have taken into account is this: that [fol. 1873] stock market experience demonstrates that whenever some real factor of depression comes into play, that this factor is amplified by selling pressure, which is generated upon a basis of those who trade on hunch or

fear, or rumor, or merely the principle of following the leader.

Now, I have not taken into account this force at all, but it is my opinion that it would offset any reduction of the 10 per cent tax penalty factor that might occur as the result of shifts in ownership.

Q. This is the irrational or speculative selling that you have just described that you have not taken into account?

A. That is right.

Q. I think you testified earlier that you had also not taken into account any selling pressure that might come from trustees or from persons who, because of the tax situation, thought it might be to their advantage to sell.

All three of those things are in the same category, I take it, as far as you are concerned?

A. That is right. I have taken into account tax factors, but not administrative problems which trustees might face.

Q. You told us earlier that you have not taken into account selling pressures that might be generated by reason of decisions by persons with a particular tax situation who find it to their advantage to pay the capital gains rather than the income tax?

A. That I have not taken into account.

Q. Now, so far, I think, Dean Jacoby, we have been discussing the market impact on the price of the common stock of du Pont Company in terms of the first of the possible alternative dividend policies that you have described.

[fol. 1874] Before I leave that, would you tell us what, in your opinion, based on the considerations that you have described in your answers to my previous questions, the amount of that impact would be stated in terms of its depressant effect on the value of the du Pont common stock?

A. Well, under Dividend Policy 1, namely, the policy of distributing historical cash dividends plus General Motors stock over the ten years, I would conclude that the amount of depression in the market value of du Pont stock would mount through time from at least 10 per cent because of the tax penalty factor up to 40 per cent, when we add the loss of earning power suffered by du Pont as a result of divesting itself of an earning asset accounting for 30 per cent of its total earnings.

That is, at the conclusion of the plan and all other things

remaining the same, it might be expected that du Pont would lose in market value about 40 per cent of its current market value.

Q. That opinion is based on the considerations that you have stated in your previous answers?

A. It is, yes.

Q. Let me ask you a question about the earnings loss factor which you have mentioned. Is it or is it not a fact, Dean Jacoby, that so far as that factor is concerned, looking at it in terms of the du Pont shareholder who receives General Motors stock on a distribution, that that factor would be mitigated to a degree by reason of the fact that he would have received a distribution of an asset.

A. It would to that extent. That is to say, while du Pont, under the assumed dividend policy I have described, historical cash plus stock, would have lost 30 per cent of its earnings power, the du Pont shareholder would have gained [fol. 1875] in his earning assets to the extent of the General Motors stock received by him, less, of course, whatever taxes he had to pay.

Q. To an individual that would be anything from 20 to 91 per cent?

A. 92 per cent.

Q. Of the market value of the General Motors stock?

A. Yes, sir.

Q. Dean Jacoby, let me now direct your attention, then, to the second dividend policy which you mentioned, which, if I remember correctly, was the policy of paying or distributing the General Motors stock by paying du Pont's dividend entirely in that stock.

In your opinion, would that dividend policy have any effect upon the market price of the common stock for the du Pont Company?

A. In my opinion it would also result in material depression of the market price of du Pont common stock.

Q. What are the reasons which lead you to that opinion, Dean Jacoby?

A. I am led to that opinion because of the factor that I think might be described as earnings uncertainty.

Under the dividend policy we are considering, du Pont would be substituting General Motors stock of equal value for cash it distributed heretofore, and it would be confronted with the need, which I mentioned earlier, of finding

profitable investment outlets for this cash; outlets not merely profitable but as profitable as its investment in General Motors has proved to be in past years.

I made a calculation of du Pont's rate of return on its investment in General Motors, to which I would like to refer, and I find that it has been relatively high.

[fol. 1876] One can calculate it in this way: The average price to du Pont of its General Motors shares is about $2.11.

Now, if we take a pre-plan value for General Motors share currently of around $50, there is a capital gain of $47.89 per share, which is a gain of 2,270 per cent over about 41 years during which this stock has been held.

That is equivalent to an average annual return to du Pont from capital gain of 8.2 per cent compounded annually. I may say that a comparison of this rate of capital appreciation with that of American stocks in general indicates that this is between three and four times the annual rate of capital appreciation of American stocks.

To the rate of capital gain we can add the cash dividends which have averaged five per cent per annum that du Pont has received from General Motors, to make the total annual return compounded annually of about 13.2 per cent.

This is comparatively very high in relation to returns from investments in American manufacturing industries as a whole.

Now, investors, to the extent that they act on rational grounds, will raise the question in their minds of the likelihood that du Pont can replace its very high yielding investment with the immense amount of cash that is accumulating as a result of this second dividend policy we are discussing.

It seems to me conservative to believe that there is at least one chance in five that du Pont will not be able to do this, and since 30 per cent of du Pont's earnings are involved, I would evaluate this earnings uncertainty factor at least six per cent.

That is to say, in my opinion the factor of earnings uncertainty under this dividend policy would depress the price [fol. 1877] of du Pont shares at least six per cent under the level they would otherwise reach.

I may say here that I am again not taking into account in this estimate any speculative or other selling pressures

that might emanate from other than purely rational evaluation of the circumstances by investors.

Q. I take it by that last qualification, do you or do you not mean, Dean Jacoby, that again you have not taken into account any additional depressant effect that might ensue by reason of offers to sell by shareholders who found it to their financial advantage to pay capital gains tax rather than income tax or by trustees?

A. That is right. I have not taken those factors into account in this estimate.

Q. So that if there should be any selling of that kind that created additional pressure on the market price of the common stock of du Pont Company, that depressant would be in addition to the depressant effect which you have attributed to what you call the earnings uncertainty factor?

A. That is correct.

Q. Now, Dean Jacoby, let me direct your attention to the third possible dividend policy which you described in your earlier testimony, that is the policy, I believe, in which the dividend is paid partly in General Motors stock and partly in cash, is that correct?

A. That is correct.

Q. Do you have an opinion on whether the adoption of that dividend policy would have any effect on the market price of the common stock of du Pont Company?

A. I do. I believe that that type of dividend policy would also result in a material depression in the market price of du Pont stock.

[fol. 1878] Q. How would that depressant effect compare with the depressant effects that you have described in relation to dividend policies 1 and 2?

A. In my opinion, it would lie within the range of the depression in market price and that one would expect on the basis of dividend policies 1 and 2.

In the case of the first dividend policy, which is the historical cash dividend plus GM stock, I have estimated a depression mounting from 10 to 40 per cent as a result of both tax penalty and earnings loss.

In the case of dividend policy 2, which is GM stock only, I estimate the depression factor at least six per cent as a result of earnings uncertainty.

This third dividend policy which involves, in essence,

compromises between the first two, would, in my opinion, produce a depression in market price somewhere within this range, depending on the particular mixture of stock and cash that was disbursed.

Q. Depending, I suppose, in part or some degree on what length of time was required to accomplish the distribution?

A. Yes, and also, may I add, the particular state of completion of the Government plan of divestment.

Q. Now, in your opinion, Dean Jacoby, what would the basic economic consequences to du Pont Company be if the Government plan should be adopted?

A. Well, I believe that the basic economic consequences to du Pont should this plan be adopted would be adverse because no business corporation can contemplate a reduction on the value of its equity shares of something between 6 and 40 per cent as any other than being a threat to its viability.

It would mean, in effect, that over the period of the plan the du Pont Company would find it difficult to raise new capital in the equity markets.

[fol. 1879] It would find, in effect, that the cost of equity capital to it would mount by some factor between 6 and 40 per cent, and that this would in effect be a penalty under which it would labor in comparison with competing firms that are also competing for resources in the United States economy.

As a result of this handicap, there would be ultimately some inefficiency, some mal-allocation of resources, which would have a depressing factor on the production of the economy as a whole.

Q. Is it or is it not true, Dean Jacoby, that these economic consequences of which you have spoken might shift or be modified depending upon which one of the three dividend policies that you have described should be followed?

Let me be specific. If the second dividend policy should be followed under which these large amounts of cash would be accumulated, then I take it the du Pont Company would probably not face any need for additional equity financing?

A. That is very likely.

Q. Its problems would then lie in another direction?

A. That is correct.

Q. Those are the problems you have mentioned in describing the effects of that second dividend policy in terms of the investment problems?

A. They would lie in the direction of uncertainty regarding capacity to replace General Motors with another high yielding investment.

Q. Now have you considered, Dean Jacoby, the degree to which these basic economic consequences to du Pont would vary in their impact among different groups of shareholders of du Pont?

A. Yes, I have. I think I spoke earlier about the inequity [fol. 1880] of the plan as among individual shareholders.

I believe there is the danger in looking at the impact of this plan in aggregate or over-all terms, but if we are to assume that the du Pont shareholders have been guilty in approving in past years investment in General Motors, and that a penalty is to be visited upon them for their guilt, it would seem that the rational and logical distribution of the penalty should be in proportion to the number of du Pont shares held. Whereas this Government plan distributes the penalty in proportion to the marginal income tax rates of the shareholders, and the two are not necessarily correlated.

Q. Dean Jacoby, leaving the question of the effect of the proposed Government's plan upon the price of the common stock of du Pont, let me direct your attention to the question of the effect of the adoption and execution of the plan upon the market price of the common stock of General Motors.

In your opinion, would the adoption and execution of the Government plan have any effect on the market price of the common stock of General Motors?

A. Yes. In my opinion, the Government plan would materially depress the market price of General Motors stock over the period of the plan.

Q. Would you state the reasons that have led you to form this opinion?

A. Well, I form this opinion by considering as best one may the effects of the plan in adding to what might be called the floating supply of General Motors stock available for investment in relation to the elasticity of investment demand for the stock.

That is, my opinion is formed by taking into account the

[fol. 1881] impact of the plan upon floating supply and upon elasticity of demand.

Q. Taking those considerations into account, for what reason do they lead you to believe that the impact of the plan would have the effect of depressing the market price of General Motors?

A. Well, it is quite obvious that the execution of the Government plan would add a large number of shares to the floating supply of stock available for investment.

In the first place, under the plan, a trustee would offer approximately 2 million shares of General Motors stock for sale each year, representing about 7½ per cent of the total equity in this giant business enterprise.

Apart from that, another 42 million odd shares, which represents another 15 per cent of the equity ownership in the General Motors Corporation, would be distributed as dividends to the shareholders of du Pont over a 10-year period, and many of these shares would be offered for sale by their owners for one or another of several reasons—because their owners needed funds to pay additional taxes due as the result of the distribution, or because the additional General Motors shares would unbalance their investment portfolio, or for other reasons.

So that we see a situation in which stock representing almost a quarter of the ownership of the largest industrial enterprise in the world is dislodged from the hands of investors and is actually or potentially thrust on the market.

In other words, the supply of General Motors stock is increased and the plan has no influence whatever in increas-[fol. 1882] ing demand. So it seems to me axiomatic that price must fall in accordance with the ancient and immutable law of supply and demand.

The only issue that one need face is by how much must price fall.

Q. Why does that question of how much the price must fall become important, Dean Jacoby?

A. Well, it becomes important because we must measure the percentage decline in price necessary to persuade new investors to come into the market and take this large floating supply of stock.

Q. In other words, while the provisions of the plan would not increase demand, a decrease in the price of General Motors will increase demand?

A. That is right.

Q. And it is a question of how low the price has to go in order to stimulate the demand necessary to absorb the increase in supply?

A. Correct.

Q. Now, have you attempted, Dean Jacoby, in your examination of this question to determine in an approximate or general sense what the increase in what you call the floating supply of the stock of General Motors might be as a result of the adoption of the Government plan?

A. Yes, I have. I have observed in the first instance that approximately two million shares of General Motors stock will be offered for sale each year by the trustee under the plan and that in addition some part of the four and a quarter million odd shares that are annually received by du Pont stockholders as dividends will also be offered for sale, either to pay their living expenses, or their taxes, or to balance their investment portfolios, or for other reasons.

[fol. 1883] I have observed that, according to an estimate of National Analysts, about 11,890,000 shares of du Pont—that is about 27 per cent of all du Pont shares outstanding—are directly or beneficially held in lots of one thousand shares or more by individuals whose marginal income tax rates are 61 per cent or more.

I have assumed that these stockholders will be under strong compulsion to sell their stock and that the GM shares that they receive will be added to the floating supply put on the market by the trustee.

These high bracket shareholders will annually, therefore, add about 1,189,000 shares to the floating supply. Now, adding that to the two million shares sold by the trustee gives us a total annual addition to supply of something of the order of three million, three hundred thousand shares.

Mr. Reycraft: Your Honor, I object to the witness reading his testimony.

Mr. Cox: Well, I refer the Court to the very eloquent and persuasive argument that was made by Mr. Metzger which led the Court to rule to the contrary the last time the question came up.

The Court: Well, the witness should first exhaust his

memory and after he has exhausted it he may refer to his notes.

Mr. Cox: He was reading his computations.

Mr. Reycraft: I understand he has exhausted his memory at this point.

Mr. Cox: He was reading a computation.

Mr. Owens: He is reading a good deal more than his computations, Mr. Cox, as I am sure you are aware.

Mr. Cox: May we go ahead, please?

[fol. 1884] The Court: Proceed.

Mr. Cox: Now, let me have the last part of the answer.

(Record read.)

By Mr. Cox:

Q. Now, Dean Jacoby, let me ask you this question: Does your assumption with respect to the addition of the floating supply of the 1,189,000 shares, which was one of the figures that went into your total, involve the assumption that every stockholder who holds more than 1000 shares of du Pont will sell all the shares of General Motors that he receives?

I am trying to find out what assumption you made about the distribution of those?

A. Well, there is no doubt that some stockholders of du Pont holding less than 1000 shares will sell their General Motors stock. I have assumed that those who would sell would balance off those du Pont shareholders in the thousand share or more bracket who did not sell, in effect.

Q. That was the process by which you reached the figure 100—rather, 1,189,000 shares?

A. Yes, sir.

Q. Now, in your answer you stated a total of three million or approximately 3,306,000 shares which in your estimate would be added to the total supply. Have you attempted to compare this figure with the total volume of trading on any stock exchanges in any particular period of time?

A. Yes, I have.

Q. Do you recall what that comparison is? You may refer to your notes.

A. Well, there are a good many figures here and I cannot keep them all in mind.

[fol. 1885] The Court: Well, if you can't you may refer to your notes.

The Witness: Thank you.

By the Witness:

A. The 3,300,000 shares, which I regard as an approximation to the total annual addition to the supply of General Motors stock, formed 38 per cent of all General Motors shares traded on all American and Canadian Stock Exchanges in 1957 and, of course, it formed a much higher amount than the 38 per cent fraction of all the General Motors shares sold for investment during that period, bearing in mind that a considerable fraction of stock exchange trading does not result in placement for investments.

By Mr. Cox:

Q. Now, unless there is a high elasticity of investment demand for General Motors, in your opinion would this increase in supply have any effect on the market price of General Motors?

Mr. Reycraft: May we have that question again?

(Question read.)

By Mr. Cox:

Q. Do you understand the question?

A. I think so.

Q. Would you answer it?

A. Unless there is a very high elasticity of demand for General Motors stock, an addition to the annual supply of this amount would result in a material depression in the price of General Motors.

[fol. 1886] Q. Now, have you considered whether in your opinion there is a high elasticity of demand for General Motors stock?

A. I have considered that question.

Q. And what opinion have you reached as a result of your consideration?

A. I have reached the opinion that the elasticity of demand, of investment demand for General Motors stock, is not relatively high. And I have——

Q. What is—Go ahead.

A. (Continuing) And I have reached that opinion on the basis of several kinds of evidence which I have looked at.

Q. What kinds of evidence do you have in mind?

A. One kind of evidence I looked at is the relation between the market value of the new General Motors shares that would be offered under the Government plan and the total amount of new common stock issues offered in recent years in the United States.

I observed in this connection that the market value of the three million, three hundred thousand shares of General Motors added to supply is about one-tenth of the total market value of all new common stock issues in the calendar year, 1958.

So this is not an insignificant but a material fraction of the investment opportunities presented to investors.

Q. What other evidence did you consider, Dean Jacoby, as bearing on the question of the elasticity of investment demand?

A. I also examined the secondary offering of, I think, 1,300,000 odd shares of General Motors in 1956 by the Sloan Foundation, and in that connection, depending on the period [fol. 1887] of time before and after the offering that one takes into account, I observed that the depression in price ranged between three and five per cent on this occasion, which suggests that an offering of nearly three times that amount of stock each year would result in a depression factor of considerably more than three or five per cent.

Q. On the basis of these considerations, have you reached an opinion as to how elastic you can estimate the investment demand for General Motors would be in terms of the nature of the price decline that would be required to stimulate additional demand?

A. I have, and I may add that there is one additional piece of evidence that seemed to me important from an economic point of view, and that is the percentage of the total assets of investment companies represented by General Motors stock.

I observed in this connection that whereas General Motors stock forms about five per cent of the value, the current market value of all securities listed on the New York Stock Exchange and, therefore, constitutes a very important part of the total investment alternatives open

to both closed end and open end investment companies, General Motors stock formed only .62 per cent of the total assets of investment companies in 1958, from which I draw an inference that for one reason or another—probably because of its fluctuating earnings, General Motors has not been comparatively a favored investment of these investing institutions.

And it would require a material decline in price to persuade them to take up a large number of shares.

[fol. 1888] Q. Have you given any consideration in your study of this question of elasticity of demand to the distribution of the ownership of General Motors common stock among different classes of owners, Dean Jacoby?

A. I did, yes, sir.

Q. What consideration did you give to that subject?

A. I observed that while there are a large number of individual owners of General Motors stock, there is a comparatively high concentration of the ownership among a relatively small number of very large owners.

If I may refer to my note, 44 per cent of all shares outstanding at the end of 1957—I think 1957 was the last figure I had—were held by 142 owners who possessed over 100,000 shares each.

Now I would conclude that from this relatively high concentration of present ownership that it would require a considerable effort, costly selling effort and price concessions, to induce a very large number of low-taxed individuals to acquire more General Motors shares.

Q. Did you, in making that study, Dean Jacoby, take into account the substantial amounts of stock of General Motors that are held by du Pont and Christiana?

A. Yes, I did. They are among the 142 owners that I mentioned.

Q. Does the fact that there is a large block of the stock held in the hands of du Pont and Christiana affect, and if so, to what degree, the inference you drew otherwise from the ownership distribution of General Motors stock?

A. I am not sure I understand your question, sir.

Q. Let me put it another way:

You have testified, I think, that in reaching your con-

[fol. 1889] clusion that there was not a high elasticity of demand, you took into account that a very high percentage of shares outstanding of General Motors are owned by

persons who own a very large number of shares. Is that a correct statement?

A. That is correct.

Q. Now I have called your attention to the fact that those figures, of course, reflect the very large ownership of stock in General Motors by du Pont and Christiana.

A. Yes, sir.

Q. What I should like to know is the extent to which in drawing the inference of which you have spoken, you took into account the fact that that concentration of ownership did exist in the case of du Pont and Christiana?

A. I did take that into account, yes, sir.

Q. Now, on the basis of these considerations that you have mentioned in your previous answers, Dean Jacoby, as bearing on the elasticity of demand for the common stock of General Motors, have you reached an opinion as to the extent of the depression and the price of common stock of General Motors that, in your opinion, might reasonably be anticipated to follow from adoption and execution of the Government plan?

A. Yes, I have.

Q. Will you tell us what that estimate is?

A. Based upon all of this evidence and the assumptions that I have made, which I consider reasonable, regarding the addition to floating supply, and the considerations that bear on elasticity of demand, it is my opinion that the price of General Motors stock would be depressed by at least a [fol. 1890] factor of 10 per cent; and that that factor of depression would persist more or less throughout the 10-year period of execution of the plan.

Q. Is the 10 per cent a maximum figure or a minimum figure, or an average figure?

A. I regard it as a minimum figure.

Q. Have you formed any opinion as to any range above or below 10 per cent within which the depressing effect may occur?

A. I think that it is entirely likely that the factor of depression might rise to as high as 20 per cent.

Q. It would be a range over the entire 10-year period, but somewhere between 10 and 20 per cent?

A. Yes.

Q. Dean Jacoby, in your opinion, what would be the

basic economic effects of the adoption of the Government plan on General Motors?

A. They would be similar, I believe, to those that would occur with respect to the du Pont Company. If, for example, the price of General Motors stock should be depressed by a factor of 20 per cent under the level it would otherwise reach, this would mean that the cost of capital to General Motors would increase by 20 per cent; or, to be specific, if General Motors would have been able, in the absence of the plan, to have sold stock for, let us say, $50 a share, paying a $2.00 dividend, equity capital in effect is costing it four per cent. If now, as the result of the plan, the stock were to be depressed to, say, $40 per share, equity capital would now cost it five per cent; and this would be a penalty that General Motors would have to bear, a handicap, as compared with other business corporations with which it is competing for capital.

And as a result of that disadvantage, again, one could [fol. 1891] expect over time some distortion in the allocation of resources among competing business firms in the economy, as the result of which there would be a dampening down of aggregate output, or production.

Q. Dean Jacoby, let us assume that the Government plan, instead of being carried out over a 10-year period, as the Government proposes, would be carried out over a period of 15 or 20 years. To what extent would that change in the proposed plan lead you to modify the opinions that you have expressed with respect to the economic and financial consequences of the execution of the plan?

A. In my opinion, the extension of the execution of the plan, over a longer period than ten years, would have moderately favorable consequences from the point of view both of the market price of General Motors and du Pont stock, and also from the point of view of their ability to compete for funds in the economy.

I think that this favorable consequence would come about because, in the first instance, a longer time available to du Pont and the trustee to distribute stock would afford a larger number of favorable market opportunities for disposing of General Motors stock, and also a longer period would be provided to the du Pont Company to search for and discover and exploit new investment opportunities.

Q. In reaching the opinions that you have expressed,

with respect to the probable economic and financial consequences of the proposed Government plan, Dean Jacoby, what assumptions, if any, have you made with respect to [fol. 1892] economic and financial conditions of the United States in the next ten years?

A. Well, all of my analysis has been based on the assumption that other factors would remain the same; and in this connection, I have assumed, in effect, that economic and financial conditions and the positions of both General Motors and du Pont in the U. S. economy would be about the same in the next ten years as they have been in the past ten years.

Q. You have assumed, I understand from the last part of your answer, that the position of the two companies in their respective industries would stay substantially about the same as they have been?

A. I have, yes.

Q. Let me direct your attention to your assumption that the economic and financial conditions in the economy, generally, in the next ten years will remain the same as they have been in the past ten years.

I will ask you this question. In your opinion, does that assumption justify any qualification or limitation?

A. Well, I certainly think it needs a qualification, to the extent that we must take into account fundamental changes in both the internal and external environment of the United States economy and of the position of General Motors and du Pont in that economy, which make the assumption that I have made so far subject to important qualifications.

Q. What is your reason for saying "subject to important qualifications," Dean Jacoby?

A. Well, what I mean, sir, is this: if we look back at the last ten years, I think we can characterize it briefly as having been a period of postwar prosperity. It has been a period in which the rest of the world was rebuilding the damage of war, in which the United States has occupied a [fol. 1893] commanding position economically, in which our exports were eagerly sought and the dollar was a very hard and strong currency.

It has been a period of considerable inflation of commodity prices and, more recently, a very great inflation of stock prices, the prices of equity securities.

It has been a period in which the leadership of both du Pont and General Motors, in their respective industries, has been unchallenged.

Now I think it requires a very heroic effort to assume that these conditions will persist in the next decade. We already see fundamental changes at work. As a result of inflation, American costs are high, our exports have fallen; our imports have not fallen. The dollar has weakened. We see at work, I believe, many forces that will tend to prevent as much inflation from occurring in the next ten years as has occurred in the past.

We see a very abnormal relationship today between the yields of stocks and those of bonds, stocks now yielding, in terms of the Dow-Jones Average, a little over 3 per cent, and bonds yielding nearly 4 per cent; this carrying an implication that many corporations will take advantage of favorable terms to float stock issues at a time when investors will be more disposed to buy bonds because of the high yields that are obtainable. And this could produce an adverse change in the circumstances in which this General Motors stock would come on the market in the next ten years, as compared to those that would have been obtained in the past ten years.

Now for all these reasons, I conclude that one must [fol. 1894] qualify severely an assumption that the conditions for offering this huge amount of General Motors stock will be as favorable in the next ten years as they have been in the past ten years, and that there are very grave risks that conditions may be adverse. We can't be sure.

The Court: We will recess now.

(Thereupon a recess was taken in the above-entitled cause until 2:00 o'clock p.m. of the same day, Friday, March 20, 1959.)

[fol. 1895] Before Hon. Walter J. LaBuy, Friday, March 20, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to adjournment.

Present: Same as before.

The Clerk: Case on trial.

The Court: Proceed, please.

NEIL H. JACOBY, a witness called on behalf of the defendant, E. I. du Pont de Nemours & Company, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

By Mr. Cox:

Q. Dean Jacoby, this morning at the beginning of your testimony, I neglected to ask you whether you are a member of the board of directors of any company? Are you?

A. I am a member of several boards.

Q. Of what companies are you a member of the board of directors?

A. I am a member of the board of directors of Packard Bell Electronics Corporation of Los Angeles, which is a diversified manufacturer of electronic equipment.

I am a member of the board of the Electronics Investment Corporation of San Diego, which is an open end [fol. 1896] mutual investment fund, specializing in securities in the electronics industry, with assets currently about $25,000,000.

I am also a director of Occidental Petroleum Corporation of Los Angeles, which is an oil and gas producing company operating in the mid-continent and western regions.

Q. Dean Jacoby, over the luncheon interval, you told me that you believed that you had misspoken in one detail of your testimony this morning relating to your computation of the state income taxes.

Is there some respect in which you would like to correct that misstatement?

A. Yes, there is. I mentioned, as I recall it, that the states of New York, Delaware, California and Connecticut imposed personal income taxes and were comparatively important states of residence of du Pont stockholders.

I am wrong about Connecticut. I had intended to say Massachusetts.

Q. It was Massachusetts that you included in your computation?

A. Yes, it was.

Mr. Cox: That is all.

Cross-examination.

By Mr. Reycraft:

Q. Now Doctor Jacoby, you testified concerning a number of assumptions you have made with respect to the type of dividend policy which the du Pont Company might adopt under the Government's proposed final judgment.

May I ask you, sir, whether you gave any consideration to a dividend policy which would consist of paying all of the stock out as a dividend in one year?

A. No, I did not specifically give consideration to that.

[fol. 1897] Q. Would you have any judgment as to what the market consequences would be of such a distribution?

A. No. I think that is an issue that I would wish to reflect on before giving an opinion.

Q. Do you know, sir, what the tax situation is with respect to a distribution of stock as a dividend when it goes beyond the earnings and profits of a company?

A. No, I am not informed on that point.

Q. If I suggest to you, sir, that approximately 40 per cent of such a dividend would be taxable and the remaining part of it——

A. I beg your pardon. I didn't hear the per cent.

Q. Approximately 40 per cent would be taxable and the remaining part of it tax free, would you have any judgment as to the amount of selling which might result from such a distribution?

Mr. Cox: May it please the Court, I object. The witness was not examined on this assumption in his direct testimony, and he has already said before giving any answers, he would like to have time to reflect on it.

By Mr. Reycraft:

Q. You have never given any consideration at all to a distribution of this type?

A. Not a single distribution, no, sir.

Q. And you haven't been asked to do so?

A. No, I have not.

Q. All right, sir, I will not go any further into that.

Were you asked, Dr. Jacoby, to make any suggestions with respect to any improvement in the mechanics of the proposed divestiture?

A. No, I was not asked to do that.

[fol. 1898] Q. What were the limitations on your testimony, sir?

A. Well, in general, I was requested to give my opinion as an economist on the economic consequences of the plan of divestiture that the Government has proposed.

Q. Without going beyond the confines of that particular proposal which was made?

A. Yes, that is correct.

May I add that I was also asked to give consideration to the modification of the Government plan to the extent that it might be carried out over, say, a 20-year period instead of a 10-year period.

Q. Did you consider, Dr. Jacoby—I am not certain whether you testified to this or not—what the market consequences would be, in your judgment, in the event that the part of the stock distributed as a dividend and not sold would be distributed without income tax, but rather would be subject to an allocation of the bases between the du Pont and General Motors stock?

A. No, I did not give consideration to that.

Q. Did you, in making your other estimates as to the market consequences, break down the depressing effect or the impact, as you will, of the sale of 20 million shares of General Motors stock over a 10-year period, as compared with the other selling which might result?

A. No, I did not. My analysis involved, as I think I testified earlier, an appraisal of the total addition of the floating supply of stock and the aggregate consequence of that addition, without attempting to allocate it as between stock sold by the trustee and stock sold by individual du Pont stockholders.

Q. Well, in forming your general opinion—or would you have an opinion now as to what the market impact would [fol. 1899] be of a sale of 20 million shares over a ten-year period without the type of tax selling which you referred to earlier?

A. No, I would not. This is a separate issue to which I have not addressed attention, and I would wish to reflect on it and study it before giving an opinion.

Q. Could you tell me what degree or approximately how much of your percentage estimates were based on the

assumption that dividend stock would be sold by persons for whatever reasons?

A. I think that my analysis of the impact of the Government plan on the price of General Motors stock assumed that not only would 2-million shares a year, approximately, be offered by the trustee, but that all of the shares or the equivalent of all of the shares coming into the hands of du Pont stockholders in the 61 per cent or greater stock bracket would be offered as well.

Q. Can you break down your assumption and eliminate the part relating to the tax selling, and state what your opinion would be of the market impact of the sale of the 20 million shares alone over the ten years?

Mr. Cox: If it please the Court, I object. The witness has already said that that is a matter he would like to study.

Mr. Reycraft: If your Honor please, it seems to me it is necessarily the basis of his opinion. He formed his opinion and gave us a percentage consisting, I suppose, of two principal factors, one being the sale of stock over a ten-year period by the trustee, and the other being a certain amount of stock he assumed would be sold by distributees.

I think he is qualified to answer the question. He must have considered it.

The Court: Overruled.

[fol. 1900] A. Well, I would respond in this way, that without further study and reflection I would not feel prepared to state what the factor of depression in General Motors stock might be if we limit it to two million shares a year, but it seems rather obvious that it would be somewhat less than if it were 3,300,000 a year. How much less I am not prepared now to say.

By Mr. Reycraft:

Q. Well, now, sir, let me ask you whether in your testimony concerning the dividend policy of du Pont, which assumed, shall we say, a part cash and part stock dividend over a ten-year period; will you say again what your percentage estimates were of the impact on General Motors stock with that type of policy?

A. My conclusion regarding the impact on the price of General Motors stock was that it would be depressed over the period of the plan, the ten years, by at least ten per cent.

Q. Now, in your opinion, would this depressing effect be in effect all of the time during the ten-year period, or are you saying that this would be in effect part of the time?

A. I believe it would be in effect substantially all of the time.

Q. Now, you testified also this morning that one of the bases for your judgment was your study of the Sloan secondary, is that correct?

A. That is correct.

Q. And what percentage did you state of impact that the Sloan secondary had on the market?

A. Well, as I studied the figures, depending on the interval of time taken into account before and after the offering, that in the face of a comparatively stable general market, [fol. 1901] stock market, the depression was between three and five per cent.

Q. Now, what period of time did you use, sir, in making that estimate?

A. My recollection is that I was observing the period of time from approximately a month preceding the offering to the day after the offering.

Q. You stopped a day after the offering and that is the basis of your three to five per cent estimate?

A. Well, I also considered other intervals of time, such as a month preceding and a month following the date of offering.

Q. And are you testifying now, or is it your statement that the three to five per cent impact figure is included in the period up to a month after the offering?

A. Yes.

Q. So you think it was a three to five per cent impact from the Sloan offering one month after the date of that offering? A. That is my best judgment, yes, sir.

Q. Do you recall, sir, what the price of the General Motors stock was a month after the offering?

A. I do not recall offhand, but I would like to say that I do not think this is determinative of the issue, because the real comparison would have to lie between what the price would have been without the offering and the price that existed with the offering, and we do not know the former.

Q. Well, I understood when you said that in your judgment it was a three to five per cent impact that you were

relating it to some market price before and some market price after the offering; am I correct?

A. Yes.

Q. So that you did take specific market prices in reaching the impact that you found?

A. I did.

Q. Now, with respect to the one-month-after period which you have testified concerning, what figure did you use to [fol. 1902] get your three to five per cent impact?

A. I cannot recall at the moment the specific figures. My recollection is that if you take periods of time that are fairly long, that you start introducing new elements into the General Motors' situation and into the market situation which obscure the effects of the offering and, therefore, the comparison would become less meaningful.

Q. Now, in your judgment, sir, is there an impact on the market price of General Motors stock now resulting from the Sloan offering?

A. Yes, in my judgment there is such an impact.

Q. How much?

A. It is probably quite small.

Q. Well, by "quite small," would you state what you mean by quite small in relation to your three to five per cent estimate?

A. Well, that is rather difficult to do. Let's say something of the order of one per cent.

Q. You think there might now persist in the market price for General Motors stock a one per cent impact resulting from the Sloan offering?

A. Yes.

Q. Now, let me ask you also whether you have made any study of the General Motors rights offering which occurred in 1955?

A. No, I did not study that specifically.

Q. Are you familiar with the facts of that offering?

A. My recollection is that in 1955 General Motors offered rights to subscribe to new stock which, as I recall, was about five per cent of the outstanding shares at the time.

Q. Do you know what the dollar amount of the offering was?

A. I don't recall.

Q. Do you know how many shares were involved?

A. No, I do not recall that figure.

Q. Do you know how much of that stock was taken up by the stockholders of General Motors?

A. I seem to recall that the bulk of it was taken up by [fol. 1903] the stockholders.

Q. Do you know whether it was necessary for the underwriters to sell any of that stock in the market?

A. No, I do not know.

Q. Are you familiar, Doctor Jacoby, with the purchases by General Motors Corporation of General Motors stock for its bonus plan?

A. I understand that General Motors Corporation has been purchasing stock for its bonus plan. My recollection is that their purchases have been of the order of about a million shares a year.

Q. Do you have an opinion as to the effect which those purchases have had on the market price of General Motors stock?

A. Oh, I am sure that they have had an effect in either sustaining or advancing the price of General Motors stock in some measure.

Q. Would you have a judgment as to how much of an effect?

A. No. I have not studied that.

Q. Well, now, sir, you have studied, have you not, the impact on the market of the sale of—you assumed the sale of something over three million shares of General Motors stock a year, did you not?

A. Yes, 3,300,000.

Q. Three million, three hundred thousand. Now, can you tell me, based on your experience as an economist, whether there is a difference in the impact on the market price of security from buying or from selling?

A. I am not sure I understand the import of your question, sir.

Q. Well, I will restate it, sir, and see if I can make it clearer. Assume that rather than the assumption which you have made, that there were going to be compulsory sales of three million, three hundred thousand shares of General Motors stock a year, that a single purchaser was [fol. 1904] buying that much General Motors stock in the market each year.

Now, you have made a judgment or formed a judgment

as to the percentage of impact on this particular stock from such sales. What would your judgment be as to the impact of such purchases?

A. That is, if I am interpreting your question accurately, you are asking me, would the impact of three million, three hundred thousand shares of purchases annually over this period be the same percentagewise?

Q. I am asking you if you have an opinion, and if your opinion is that it is the same. Is that your answer?

A. Other things being equal, it is certainly true that the introduction of demand, of fresh demand, will raise the price.

Q. In the same amount?

A. Not necessarily in the same percentage.

Q. Well, I am not an economist, so could you explain that to me, sir?

A. Well, I think that we have here a problem of evaluating what might be called the elasticity of demand and the elasticity of supply for investment purposes of this security; and it would not necessarily be true that the introduction of investment demand of a given amount would produce the same percentage rise in the price of the security as the introduction of the same amount of selling on the part of investors would produce in percentage fall in the price. That is, the two things are not necessarily parallel. I would think they would be of the same order of magnitude.

Q. Let me see if I can ask you another question relating to the same subject that may help you.

Assume a purchaser wants to buy a specific commodity, [fol. 1905] and in this case let us assume that it is General Motors stock. His purchases are limited to that particular commodity.

A seller is selling to people in the same quantity who are buyers over generally a large—you refer to cross-elasticity of demand—they are potential buyers of any stock at appropriate price and yield, as I believe you testified.

Now, in your judgment, sir, does the purchaser who is limited in purchases have any more difficult problem than the seller?

A. Your question is, does the purchaser have any more difficult problem?

Q. Yes, sir.

A. Than the seller?

Q. Yes, sir.

A. Well, again, I don't know just precisely what you mean by "difficulty of problem."

Do you mean does he have to bid the price up in order to get the stock by a larger percentage than the seller would have to accept in terms of a price reduction?

Q. That is the way it would appear to me and I am trying to find out if that is your opinion.

A. I wish to be responsive, but my answer would be that you would expect the introduction of a given amount of new investment demand for General Motors stock, specifically, to raise the price by a certain per cent, other things remaining the same, and you would expect the introduction of selling pressure on the part of investors to lower the price by a percentage that would be of the same order as the first percentage.

Q. As a matter of supply and demand, shall we say if the demand is limited to General Motors stock, whereas, on the supply side, the selling side, the potential purchasers are potential purchasers of all stock. Don't you, as an [fol. 1906]. economist, see that there is any more easy problem for the seller?

A. I think I understand now what you are getting at. It is certainly true that potential buyers of securities have a fairly wide range of alternatives open to them. The potential seller of a security has to get rid of that particular security.

Q. Well, he is selling to people who, I believe, you have testified, are potential purchasers of any stock, depending on its price earnings ratio, its yield, its market prospects, or whatever other factors enter into the investor's judgment.

Now, if the purchaser, on the other hand, is limited to buying stock of a single company, do you foresee any particular problems for that purchaser?

A. In general, purchasers certainly compare prices and yields of a number of securities before making a purchase; and therefore the price of a given stock will be related by this process of comparison to the prices and yields of other stocks.

Q. So that, in your judgment, this is what you would refer to as cross-elasticity of demand, is it not?

A. It might be so described, yes.

Q. Now assuming it to be a fact that General Motors is limited in its purchases of bonus stock to its own stock, do you have an opinion as to the amount of the percentage impact on the market price of General Motors stock, of General Motors purchases of one million shares of its own stock a year?

A. I do not have an opinion. It is a question I haven't thought about.

Q. Well——

A. I would certainly say——

Q. (Continuing)—you have explored the problem of selling 3,300,000 shares a year, have you not?

A. Yes, that is an issue I have thought about.

[fol. 1907] Q. Can you explain what the difference would be between buying and selling problems; why an opinion you have formed with respect to selling would not necessarily involve making a judgment as to buying?

A. Well, I think the two transactions, sir, are quite different in many respects.

In the first place, the amount of stock involved differs materially; in the second place, the timing of the purchases and sales differs materially.

In the case, for instance, of General Motors purchases for its pension funds, the managers of that fund, I assume, are free to elect a favorable time of purchase, whereas in the case of sales by the trustee, he has to make his sales within a given time.

Q. How does General Motors purchase that stock, do you know?

A. I am not acquainted with their method of purchase.

Q. You have assumed, though, that they are free to time their sales?

A. I have assumed that, yes.

Q. And you have assumed also that the trustee is not free to time his sales?

A. Yes, I have assumed that he must sell so many shares of stock per annum; within that limit, he has certain discretion.

Q. On a particular day?

A. Not necessarily on a particular day. He has to sell or distribute so many shares in a particular year.

Q. Did you make any assumption as to the time period within the year in which he would have to sell the stock?

A. No, I did not.

Q. Do you think it would be relevant to consider whether he was selling it all at one time, as one secondary, in a [fol. 1908] particular year? A. Well, I had assumed that the trustee would order his affairs, his program, in the best possible way to take advantage of as favorable selling opportunities as he could.

Q. Do you have a judgment as to what the best possible way would be within the confines of the proposal you studied?

A. No, I do not. There are many alternatives open. I think this is really a matter for detailed market analysis.

Q. I believe you testified that you were the research partner of an investment banking firm, is that correct?

A. I was, in 1937.

Q. Are you familiar with the mechanics of securities sales in large blocks?

A. I was at that time.

Q. And you are not now?

A. No, sir. I haven't been in the investment banking business since 1938.

Q. Are you familiar, sir, with the sale by the Ford Foundation of its stock in 1956?

A. In a general way, I am.

Q. In your judgment, did that sale of that stock have an impact on the market price of Ford stock?

A. My understanding is that there was no quoted market price for Ford stock at that time.

Q. Well, in your judgment, is Ford selling now for less than it would have, if a smaller amount had been sold on the market?

A. Yes, I think it probably is.

Q. As a matter of analytical technique, how would you go about assessing that percentage of impact?

A. Well, I think one would have to do or follow the same general technique and procedure that I tried to follow in the case of assessing the sale of General Motors stock under the plan, namely, to try to determine the elasticity of demand for Ford Motor stock by considering whatever

[fol. 1909] evidence bearing on that you could find; and of course your conclusion would not be 100 per cent certain; it would be an expression of judgment.

Q. You did consider the cross-elasticity of demand in forming your judgment as to the disposition of the stock under the proposal and study, is that correct?

A. Oh, yes, indeed.

Q. Is it possible as a matter of mathematics, to make a computation as to the cross-elasticity of demand of various products?

A. Well, are you referring now to any product, or to stocks, particularly?

Q. The cross-elasticity of demand is a general economic concept, is it not, which applies not only to securities, but to salt, butter, or any commodity?

A. It does. It is certainly possible to analyze statistical data and to arrive at quantitative estimates in cross-elasticity, yes.

Q. Is it an exceptional technique to measure cross-elasticity of demand between such things as butter and salt, for instance?

A. Yes.

Q. Diamonds or whatever you will?

A. Yes.

Q. How are those relationships expressed?

A. Again, I am not sure what the import of your question is.

Q. Well, if you don't understand the question--do economists say, well, as they look at butter and salt, it looks like a lot, a lot of cross-elasticity of demand or a little, or do they express it in percentages or ratios?

A. Normally it is expressed in percentages. That is, the concept of elasticity is that it is a ratio. It is the ratio of a percentage change in the quantity taken or purchased to a percentage change in the price.

[fol. 1910] Q. If you were making such a computation with respect to butter and salt, how would you do it?

A. Well, I would consider what percentage changes would occur in the takings of each commodity relative to the percentage changes in their respective prices.

Q. Did you make any such study in connection with your preparation for this case?

A. No, I did not.

Q. You have made no mathematical computation at all?

A. I have made no mathematical computation for the reason that it seemed to me our evidence was too scanty to form the basis of a mathematical formulation.

Q. What are the necessary basic facts which you have to know to measure cross-elasticity of demand?

A. You have to know elasticities of demand for all of the different commodities being compared; namely, you have to know the elasticity of demand for General Motors stock, and you have to know the elasticity of demand precisely for every other stock with which General Motors competes in the estimates of investors. This is an impossible task to try to express, I think, in precise quantitative terms.

Q. It is impossible to express it mathematically?

A. We do not have the data that would permit us to arrive at a reliable quantitative estimate of that kind, in my judgment.

Q. What are the stocks which compete with General Motors stock for the investor's dollar?

A. I would assume, for one, Ford Motor Company common stock would compete.

Q. Do you assume any others?

A. Oh, yes. The closest competitors, presumably, would be the common stocks of automobile companies, and somewhat less close competitors would be the stocks of other large industrial corporations, chemical, electronic, and so on.

[fol. 1911] Q. All of them compete, don't they, sir?

A. In one degree or another, they all do.

Q. You refer to the yields on bonds of investors' dollars, the shift back and forth between bonds and stocks. Do they also compete?

A. Still more remotely there is competition there, yes, sir.

Q. But there is competition?

A. Yes.

Q. In forming your opinion with respect to the impact on the market of the sale of approximately 3,300,000 shares of General Motors stock a year, did you consider it relevant to consider what percentage of the trading of General Motors stock that would involve on the stock market?

A. If I understand you correctly, sir, you are asking me if I considered what increase in aggregate trading in Gen-

eral Motors stock would accompany such an offering of 3,300,000 shares per annum?

Q. All right. Can you answer that question?

A. No, I did not consider that specifically.

Q. Do you think it relevant?

Do you think the percentage of the sales to the trading on the New York Stock Exchange, for example, is relevant in reaching such a judgment as to the market impact?

A. Yes, I think it is relevant. In fact, in my testimony, as I recall, I pointed out that the 3,300,000 shares per annum would form 38 per cent of aggregate trading in General Motors shares on the New York Stock Exchange, and undoubtedly a much larger percentage of what might be called investment purchases, because only a fraction of total trading represents the passage of a stock into the hands of investors.

Q. Did you consider the trading on other exchanges? [fol. 1912] A. I did not because of the fact that the great preponderance of trading in General Motors is on the New York Stock Exchange.

Q. Did you consider over-the-counter trading?

A. No, sir, I did not.

Q. Do you know how much stock, General Motors stock, was traded on the New York Stock Exchange last year?

A. I do not recall. I did know, I think, at one time.

Q. What percentage in your judgment would the sales have to reach before a discernible market impact could be observed?

Mr. Cox: May we have that question read, please?

(Question read.)

Mr. Cox: I object to the form of the question. I don't know what percentage of what.

Mr. Reycraft: I think the witness may understand.

By Mr. Reycraft:

Q. Do you understand my question?

A. Again, I was going to ask the percentage of what to what? I wasn't quite clear.

Q. The percentage of selling to trading, the quantity of trading on the exchange through the year, and quantity

of stock sold pursuant to any judgment which may be entered in this case.

A. Oh, I don't think that any reliable ratio could be predicted as to between those two quantities.

Q. I think perhaps I will repeat the question I first asked you: Do you have any judgment as to the percentage of the total trading on the New York Stock Exchange which selling would have to reach before a discernible impact would be observed?

Mr. Cox: May we have that question read, please?

(Question read.)

[fol. 1913] By the Witness:

A. I am sorry, I don't understand the question.

By Mr. Reycraft:

Q. Let me see if I can explain it a little.

Assuming the trading was 10 per cent, assume the sales made under this judgment were 10 per cent of the total trading on the New York Stock Exchange.

A. In dollar amounts?

Q. All right, dollar amounts or shares. I suppose we come to the same thing if we limit it to General Motors stock.

In your opinion would that percentage of sales have an impact on the market price of General Motors stock?

A. Well, in my opinion, and here again I hope I understand the question accurately, if under this plan there was an addition to the floating supply of stock, General Motors stock specifically, that amounted to 10 per cent of the total value of securities outstanding on the New York Stock Exchange, one could confidently predict a substantial decline in the price of General Motors stock.

Q. When you say a substantial decline, what quantitatively do you mean?

A. Again, I would not feel prepared to state a specific percentage without considering the circumstances of the offering and the condition of the market and a good many other factors.

Q. Assume, as you did with the Government's proposal, that the circumstances of the offering would be in the best possible manner. I am not sure what that is, but whatever

assumption you made, will you make the same assumption with respect to the 10 per cent question I asked.

[fol. 1914] A. Well, when I said substantial, I mean in round numbers, say, five per cent or more.

Q. You think an increase in the floating supply of as much as 10 per cent could have an impact of about five per cent or more?

A. If this percentage was repeated year after year for ten years, yes.

Q. Well, let's limit it to a single year so that we can break it down, if we can. Suppose the sales are made on a daily basis.

A. I have no judgment on that.

Q. You haven't considered anything of that nature?

A. I haven't considered that.

Q. Have you considered, in forming your judgment as to the impact resulting from the sales which you studied, whether selling on a daily basis would have any benefit?

A. No, sir. I am not a specialist in security markets, and I wouldn't feel competent, without a great deal of study, to discuss that.

Q. On what did you base your testimony with respect to these percentage impacts which you referred to?

A. I based them on the simple assumption that the trustee would conduct his selling operations to the best advantage.

Q. Well, you are an economist and a scientist. Did you do any mathematics on a piece of paper to reach this conclusion?

A. Well, I filled up a good many foolscaps with calculations in the course of arriving at my conclusions, yes.

Q. And what went into your calculations?

A. I would have to search my waste basket to get an answer to that explicitly.

Q. Do you know now what figures you considered relevant in making your calculations?

A. In making my calculations of the percentage of [fol. 1915] decline or the pressure in the market price of General Motors?

Q. Yes, sir.

A. I stated a good many of those factors in my testimony.

Q. Did you assign them any quantitative importance?

A. I attempted to weight them all in my mind——

Q. What weight did you give to the various factors?

Mr. Cox: Did the witness finish his answer?

Mr. Reycraft: If he hasn't, I will be glad to have him do it. Had you finished? I didn't mean to interrupt you.

The Witness: What was the last question?

By Mr. Reycraft:

Q. The last question was what weight did you assign to each of the factors which you considered?

A. I did not attempt to assign a mathematical or quantitative weight to each factor.

Q. Well, in analyzing an economic problem, is it fairly common practice to try to apply techniques of measurement and analysis in mathematical terms?

A. Yes, it is, but there are many kinds of economic problems which are not susceptible to that kind of analysis, and in my judgment, this is one of them.

Q. This is one of the problems that is not susceptible to mathematical analysis?

A. That is my opinion.

Q. Or to economic analysis?

A. It is subject to economic analysis, but that is different from mathematical analysis.

Q. As a scientific economist, what tools or what techniques did you use?

A. I used the quantitative methods where applicable. [fol. 1916] Q. Where were they applicable?

A. Well, they were applicable, for example, in my estimate of the tax depression factor.

Q. You got that figure from National Analysts, did you not?

A. No, I did not get that from National Analysts.

Q. Where did you get it?

A. I got some figures on the basis of which I made my calculations from National Analysts.

Q. What calculations did you make on the basis of National Analysts' figures?

A. I used one figure from National Analysts in making my calculation of the tax factor; namely, the figure that the weighted average tax rate applicable to individual holders

of du Pont stock on distributions of General Motors to them was 57.2 per cent.

Q. Is that the only figure you used of National Analysts?

A. I may have used others. This is the only one I used in that connection.

Q. The only one you can recall right now?

A. Yes.

Q. Using that figure, you arrived at the quantity of 3,300,000 shares of stock to be sold each year?

A. No. No, I arrived, using that figure, at a conclusion that the market price of du Pont would be depressed by a factor of ten per cent because of the tax penalty.

Q. I am trying to retrace your reasoning, sir.

Did you step immediately from the tax figure to the conclusion that there would be a depressing effect on the market price?

Mr. Cox: Of du Pont or General Motors?

Mr. Reycraft: General Motors.

[fol. 1917] By the Witness:

A. No, I did not. If you are referring now to General Motors, I did not analyze or relate taxation to General Motors because it seemed to me that this was not quantifiable in the case of General Motors as it is in the case of du Pont.

Q. Well, then, where did you get your 3,300,000 figure?

A. I have explained that I got my 3,300,000 figure by adding 1,300,000 shares to two million shares.

Q. Where did you get the 1,300,000 shares?

A. That represents the equivalent of the General Motors stock that would come into the hands of du Pont stockholders in tax brackets of 61 per cent or more per annum.

Q. And you assume all of it would be sold?

A. I assumed the equivalent of all of it would be sold because some du Pont stockholders in higher tax brackets would not sell and other du Pont stockholders in lower income tax brackets would sell, and I assume they would offset each other.

Q. Offset each other and cancel out, and you get to 1,300,000?

A. That is correct.

Q. Just so that I am clear myself, 1,300,000 represents the General Motors stock allocable to those persons in brackets of 61 per cent or more?

A. Yes, sir.

Q. And you assume the equivalent of all of that would be sold?

A. I did.

Q. From this figure and from the two million figure which we can take it is fixed, how did you get to your percentages?

A. Well, after arriving at this estimate of the annual addition to the floating supply of General Motors stock, I [fol. 1918] then proceed to examine what evidence seemed to me important in determining the elasticity of investment demand of General Motors stock.

Q. What evidence was that, sir?

A. Among other things I considered the extent to which investment funds were holders of General Motors stock. That is, it seems to me relevant to consider the proportions of their assets formed by General Motors stock in relation to the total investment opportunity in stocks that General Motors constitute in the market.

I found, to repeat what I testified to, that General Motors forms about five per cent of the total investment opportunity, but only .62 per cent of the assets of these funds, which indicates that it has not been a favorite security for one reason or another; and that it would require, therefore—I drew this inference—a considerable reduction in the price of General Motors to induce these funds to become buyers in quantity of General Motors offerings.

Q. How did you then, using this analytical technique, get the percentage?

A. Well, I derived a certain inference by this method about the relatively slight elasticity demand for General Motors stock, and I took into account other evidence bearing on its elasticity, notably the fact that there is a fairly high concentration of holdings, and that in view of the fact that the well-to-do person in a high bracket would probably not be a buyer under these conditions, that it would be the lower-taxed and the smaller investor. I considered that it would require considerable selling effort and expensive selling effort and a considerable concession in

price to get these 3,300,000 shares distributed annually into the hands of a large number of smaller investors.

[fol. 1919] By Mr. Reycraft:

Q. What weight did you assign to each of these factors?

A. I did not assign any particular weight.

Q. You put them all into the hopper and came out with a percentage conclusion?

A. That is right.

Q. Did you consider a range of percentages?

A. Percentages of what, sir?

Q. The percentages you testified about this morning of impact on the market.

A. No, my conclusion, as I recall, was expressed in terms of what seemed to me the minimum percentage of decline that one could expect, namely, 10 per cent, and I believe it could be higher than that, but I would set that as the minimum expectation.

Q. Well, did you take the 10 per cent figure and make any computations as to what that would do to the price earnings ratio or the yield of General Motors on the market price you assumed?

A. Well, obviously, it would involve an increase of about a tenth in the yield of General Motors, assuming the same dividend continues. If the pre-plan price of General Motors were, let us say 50, this would contemplate a drop to about 45. I mean, these are simple matters of arithmetic. I did consider those.

Q. Did you compare your assumed changes in the price earnings ratios and in yields to other stocks which you considered comparable?

A. Yes, I did make some comparisons of that kind.

Q. What stock did you compare it to?

A. Well, I considered the yield of General Motors stock in relation to the yields of other automobile stocks.

Q. What were your conclusions? What were the results [fol. 1920] of your comparisons in that respect?

A. In general, General Motors has yielded somewhat less than other automobile stocks because the automobile industry as a whole is one subject to very large fluctuations of earning power and dividends. And——

Q. Did you—— Oh, go ahead.

A. To complete my answer, on the other hand, General Motors stock has yielded more than the average of stocks,

the Dow-Jones Average or the Standard & Poor's Average, because of these characteristics of the auto industry.

In other words, G.M. yields less than the rest of the auto industry but more than the rest of the economy.

Q. It sells at a higher price in relation to its earnings?

A. It sells at a somewhat lower price in relation to its earnings than the Standard & Poor's Index shows characteristically.

Q. It sells at a higher price than comparable automotive stocks?

A. Yes.

Q. You then made no mathematical analysis of the comparison between various supplies and demands of General Motors stock, as comparing them with various assumptions of other stocks, have you?

A. I made no mathematical analysis because I did not have available, nor see any chance of getting the data that would enable one to apply mathematical analysis effectively.

Q. Well, how was it any more difficult to make such an analysis with respect to stock than it is with respect to other commodities which—I believe it is a fact that economists are generally able to make computations as to cross-elasticity of demand.

A. Well, I think the answer to that is that when we are [fol. 1921] dealing with stocks we are dealing with non-homogeneous things. We are dealing with an area of competition for the investor's dollar that is much wider than exists with respect to most commodities. The problem is more complicated.

Q. It is a more difficult problem, is it?

A. It is a more difficult problem intrinsically, yes, sir.

Q. Returning to the subject of purchases of General Motors stock by a single purchaser, what percentage of total trading do you think such purchases would have to be before they would effect the market price of General Motors stock?

Mr. Cox: Let me hear that question again, please.

(Question read.)

Mr. Cox: You mean purchases on the stock exchange?

Mr. Reycraft: Yes.

Mr. Cox: I thought the witness answered that.

By the Witness:

A. Well, if I understand the question, my answer would be that every fresh element of demand has some effect, however minute, on the price.

By Mr. Reycraft:

Q. I will show you Government's Exhibit 148 and ask you if you will take a few seconds to examine that exhibit.

First let me ask you, sir, do you know of any other stock for which there is a comparable demand, as there is for General Motors stock through this source of purchasing?

Mr. Cox: Would you read that question again?

[fol. 1922] Mr. Reycraft: The source referred to on the exhibit, which is General Motors bonus purchasing.

By the Witness:

A. Do I know of any other corporation having a comparable stock purchase plan?

By Mr. Reycraft:

Q. A demand or total demand quantitatively comparable to the demand which emanates from General Motors' purchases of stock for its bonus plan.

A. Well, that is a question I have not studied. I do not know whether it exists or not.

Q. You do not know of any?

A. I do not know of any.

Q. In your judgment, and having referred to the figures on Government Exhibit 148, would the purchases of General Motors stock in that quantity have an effect on the market price on General Motors?

Mr. Tierney: I object to that question unless the witness is advised as to the manner in which these purchases were made, which may have some difference.

By the Witness:

A. Well, I am not advised as to the manner in which the purchases are made.

By Mr. Reycraft:

Q. You assume that they are made in the best possible manner as you assumed earlier that the sales under the judgment were made in the best possible manner?

Mr. Cox: Is there a question on the books?

[fol. 1923] Mr. Tierney: If the Court please, I have this further objection. This is an attempt to compare voluntary purchases with forced sales.

Mr. Reycraft: General Motors has a contract with its employees under which it has an agreement to deliver stock——

Mr. Tierney: There is no such contract. As a matter of fact, you are trying to relate this to the forced sales.

The Court: Well, you will be able to question the witness.

Mr. Tierney: I object to it, your Honor, on the grounds it calls for an improper comparison. It calls for a comparison of voluntary purchases with forced sales.

The Court: You can develop that by questioning later. Overruled.

Mr. Cox: May I have the question read?

The Court: Read the question.

(Question read by the reporter as follows:

"Q. You assume that they are made in the best possible manner, as you assumed earlier that the sales under the judgment were made in the best possible manner?")

By Mr. Reycraft:

Q. I will ask you a question, sir, so we can get on with it.

Referring to the figures which appear on Government's Exhibit 148, do you have an opinion with respect to the percentage impact on the price of General Motors stock [fol. 1924] on the New York Stock Exchange which may arise from those purchases?

A. No, I do not have an opinion as to the percentage change.

Q. Do you believe it would be possible as an economist to form any judgment as to the percentage impact of those purchases?

A. I believe it would be possible to form such a judgment.

Q. How would you do it?

A. Well, I would wish to try to examine the character of the trading that was occurring. I observed, for instance, on the exhibit that in the calendar year 1957, 7,400,000 shares were traded. I would seek by all means possible to analyze that trading to determine what fraction of it represented simply a turning around of securities from the hands of speculators who were acting on short term motives and what percentage represented the movement of stock from the hands of one long term investor to another. This would be one course of inquiry.

I would also consider it relevant to consider the relationship between the amount of investment trading, that is, considering this total trading in two segments, speculative trading and investment trading, as to the percentage of investment trading to the total number of shares outstanding and in potential supply.

I would consider it relevant to try to measure the elasticity of demand for General Motors stock, by which I mean what percentage change in price would be necessary to call for a given percentage increase in investments.

These are all factors that I would consider relevant and try to analyze in reaching a judgment.

[fol. 1925] Well, do I understand, then, that you are unable to form an opinion at the moment, because you have not done these things?

A. That is right, with respect to the focusing on 1956, specifically, with respect to the 988,000 shares purchased by General Motors in that year.

Q. And with respect to the trading on the New York Stock Exchange?

A. Yes.

Q. You didn't make such a study in connection with your study of the judgment in this case?

A. I considered many of these factors in reaching my opinion as to the forced offering of 3,300,000 shares, yes.

Q. Did you make this analysis of the market which you thought would be relevant, or did you not?

Mr. Cox: I object. I thought Mr. Reycraft was asking whether he made a study of the effect of these purchases.

Mr. Reycraft: I asked, and he testified that he thought it would be relevant to analyze the character of the trading on the Exchange.

By Mr. Reycraft:

Q. And I asked you if you did that.

A. No, I did not analyze that.

Q. Do you think it would be relevant?

A. Yes, I think it would; I think it would be a very useful exercise.

Q. But you didn't do it?

A. No, but there are a great many other things I did do.

Q. Not having done that, do you nevertheless have an opinion of the impact, percentage impact, on the market price of General Motors stock on the New York Stock Exchange, which results from the purchases by General [fol. 1926] Motors, as they are set forth on that exhibit?

A. No, I have no such opinion. The circumstances of these purchases, I presume, would be much different than the circumstances surrounding the mandatory sales of stock under the Government plan.

Q. And one of the reasons you don't have an opinion, I believe you testified, is because you haven't analyzed the character of the trading, is that correct?

A. That is one of many reasons, yes.

Q. What are the others?

A. Well, I haven't examined the issue as to whether the General Motors, the manager of this General Motors Pension Fund, or whatever it is, is under obligation to purchase a given number of shares at a given time.

I think this is the most relevant consideration, because the trustee, under the Government plan, is under an obligation to sell a certain number of shares.

Q. Do you know how long General Motors has been purchasing bonus stock?

A. No, I do not.

Q. Do you think that would be relevant in reaching a judgment as to the market impact?

A. I suppose it would be.

Mr. Cox: I take it in that last question, Mr. Reycraft, you meant the market impact of the purchases?

Mr. Reycraft: The market impact of the purchases of General Motors stock.

By Mr. Reycraft:

Q. Referring to the percentages of trading which appear on Government's Exhibit 148, in your judgment, as an economist, are these percentages of such a magnitude that you would anticipate that there would be some impact on [fol. 1927] the market price of General Motors stock?

A. Yes, they are.

Q. And you are unable to assign a quantitative amount?

A. I am unable to, without further study of the kind I mentioned or described.

Q. Without an analysis of the character of the market?

A. Yes.

Q. Are you aware of any impending sales of large amounts of stock, outside of this case?

A. Well, I am not in the investment banking business. No, I am not aware of any, particularly.

Q. Do you know of any large secondaries which have been announced, particularly?

Mr. Cox: If you want to ask him about the Ford issue, do so.

Mr. Reycraft: You don't have to tell him, Mr. Cox; perhaps he knows, if he is an expert.

Mr. Cox: Can't we move this along?

By the Witness:

A. I have seen a newspaper account to the effect that the Ford Foundation is planning to make an offering of some of its holdings of Ford stock, yes.

By Mr. Reycraft:

Q. Do you know how much?

A. The figure 2 million shares sticks in my mind.

Q. Do you know what the dollar value of that stock would be?

Mr. Cox: As of what date?

You mean the offering price, or the price today?

I object to the question.

[fol. 1928] The Court: Sustained.

By Mr. Reycraft:

Q. Do you know what the offering price is?

A. No, I do not.

Mr. Cox: It hasn't been fixed.

By Mr. Reycraft:

Q. Do you know what Ford sells for on the New York Stock Exchange as of any date?

A. Well, I have looked at quotations, and my recollection is that it has been selling somewhere between $50.00 and $55.00 a share in recent weeks.

Q. Do you have a judgment as to whether such a sale will have an impact on the market price of Ford stock?

A. Yes, I think it would have an impact on the market price.

Q. Do you have any judgment as to how much?

A. No, I do not. I would say, in general, that the dislodgement of 2 million shares from the firm hands of an investor, a long-term investor like the Ford Foundation, and the addition of that 2 million shares to the floating supply of Ford would, other things equal, have a depressing effect; but without study, I would be unable to measure the extent.

Q. Do you think it would be possible to measure it?

A. I think it would be possible to arrive at an informed judgment on that question, yes.

Q. Do you think that the factors which would be relevant are the same factors that would be relevant in making such a determination with respect to General Motors stock?

A. Well, I think that many of the factors, relevant [fol. 1929] factors, would be the same; but I am sure that there are additional factors in the Ford case that one would want to examine.

Q. Do you think that the fact that the Ford Foundation may sell additional stock would have any depressing effect on the market price of that stock?

A. Yes, I believe that it does have that effect.

Q. Do you think it is measurable?

A. I believe that an informed opinion could be reached as to the order of magnitude, yes, with sufficient analysis.

Q. What technique would you apply in reaching such an opinion with respect to the depressing effect?

A. Well, I have described a technique of that kind already; but, in general, it seems to me that one would wish to know the potential quantity and timing of the offerings by the Ford Foundation. In the second place, one would wish to measure the elasticity of demand for Ford stock.

Q. How would you do that?

A. By the methods that I have already described in the case of General Motors stock—to try to arrive at some estimate of the percentage reduction in the price of Ford stock that would be necessary to elicit investment demand sufficient to take up the potential supply coming out of the Ford Foundation.

Q. Did you make any study of the amount of expenses which would be incurred on the organization of a personal holding company?

A. No, I did not.

Q. You testified that there would be significant factors in deterring stockholders from doing this, is that correct?

A. I believe that I testified that there were expenses that were more than trivial in connection with the organization and operation of a holding company; costs of chartering and of filing the returns, and keeping books and records, and so forth.

[fol. 1930] I haven't myself, gone into the details.

Q. This, again, is something you have not made any attempt to measure in forming your judgment?

A. No, I have not.

Q. Now you testified also, I believe, that the loss of earnings by du Pont which would result from the loss of General Motors stock would have an effect on the market price of du Pont, isn't that correct?

A. Yes, under the first dividend policy I described.

Q. These earnings, however, would be paid to the stockholder who received the distribution of the stock, would they not?

A. What earnings now, sir, are you referring to?

Q. Earnings on the stock of General Motors Corporation.

A. If the stock of General Motors Corporation were distributed by du Pont, to du Pont stockholders, and they continued to hold the stock, they would, of course, continue to receive the dividends that du Pont formerly had received.

Q. You got one of your estimates somewhere up around

40 per cent, and I would like to know whether, in getting that 40 per cent, you were deducting from the asset value of du Pont, as reflected in the market, the General Motors stock divested?

A. Yes, I was.

Q. You weren't testifying, were you, that there would be a 40 per cent depressing effect, sir?

A. No. I was estimating, sir, the depression in the price of du Pont stock on the assumption that du Pont distributed its historical cash dividend, plus the General Motors stock, and after ten years had divested itself of an asset that had theretofor produced 30 per cent of its earnings. Other things equal, my estimate was that there would be, [fol. 1931] at the end of this period, a total depression in the price of du Pont stock of 40 per cent, of which about 30 per cent would represent earnings loss, and 10 per cent would represent tax impact.

Q. Are you familiar with an antitrust judgment which required the sale of Aluminium stock?

A. Of what stock?

Q. Aluminium Limited.

A. No, I am not familiar with that.

Q. You never heard of that?

A. I have heard of it in very general terms.

Q. You didn't study it in connection with your testimony for this case?

A. I did not, no.

Q. Did you prepare any exhibits in connection with your testimony?

A. No, I did not.

Mr. Cox: If the Court please, may I inquire what Mr. Reycraft means? The only exhibit we put in was the exhibit on the bibliography.

Mr. Reycraft: The question is clear.

Mr. Cox: I understand that an exhibit is something you put in evidence.

What are you talking about?

Mr. Reycraft: Is his answer no, or are you answering——

Mr. Cox: Is there an answer on the book?

By the Witness:

A. I have not prepared any exhibit which has been introduced in evidence, to my knowledge.

By Mr. Reycraft:

Q. Have you prepared any tables or studies on the basis of which you have formed your opinion?

A. Well, I have made up quite a number of tables in [fol. 1932] the nature of work papers, and I have written a good deal of material in an effort to try to clarify my thinking, yes.

These are all work papers. I have not prepared any exhibit.

Q. Would you make your work papers available to us for examination, sir?

Mr. Cox: I object to that. I don't see that Mr. Reycraft is entitled to have that. This man is here as an expert. Those work papers involve consultations between counsel and a man who is employed to testify as an expert.

If any exhibits which were offered in evidence, Mr. Reycraft can see, or any computations he wants, we will give them to him.

Mr. Reycraft: I am trying to find out how he got these percentage figures.

Mr. Cox: He has testified as to that.

Mr. Reycraft: He said he got them, I understand, by making some computations.

Mr. Cox: He testified to the computations in his direct testimony, step by step.

Mr. Reycraft: May we have the work papers on it?

The Court: You may answer the question.

By the Witness:

A. Well, your question, as I recall, was whether I had work papers.

I don't have work papers with me. I have a great many work papers, most of which I destroyed as I went along; but I have got a file of papers on this subject. I don't know how many there would be.

By Mr. Reycraft:

Q. May I examine them?

[fol. 1933] Mr. Cox: I have no objection to their seeing what Dean Jacoby has with him here.

By the Witness:

A. I have only a very small part of my papers here, but you are perfectly welcome to examine them, yes, sir.

The Court: The Court stands recessed for ten minutes.

(A recess taken.)

The Court: Continue.

Mr. Reycraft: Will you mark for identification as Government Exhibit No. 537, a three-page document which was furnished to the Government by General Motors Corporation, and which consists of charts showing the trading in General Motors stock on the New York Stock Exchange, and which shows General Motors purchases of its bonus stock on the New York Stock Exchange.

(Thereupon said document was marked Government Exhibit No. 537 for identification.)

Mr. Burnham: Mr. Reycraft, I am merely checking to see. I am not at all sure that we furnished any such document to you. I don't recognize it nor do I find it in my files.

Mr. Reycraft: Mr. Nitschke, did you furnish to the Government a three-page chart which portrays the trading of General Motors stock on the New York Stock Exchange? I will show it to you.

Mr. Burnham: So the record will be clear, we have now found that it did come from General Motors Corporation. I am sorry.

[fol. 1934] Mr. Reycraft: Will you also mark for identification as Government Exhibit No. 538 a letter from Mr. Henry M. Hogan to Mr. Harold C. Patterson, Director of Division of Trading and Exchanges, Securities and Exchange Commission, Washington, D. C., dated July 18, 1955.

(Thereupon said document was marked Government Exhibit No. 538 for identification.)

By Mr. Reycraft:

Q. Will you refer to Government Exhibit 537 and examine it for a moment, please?

A. Yes, sir.

Q. I will read to you a sentence from the attachment to Mr. Hogan's letter of July 18, 1955, Mr. Jacoby. That sentence is: "The corporation has a standing rule that it will not itself make a high bid on its own stock, although it has had upon occasion to match equally high sales price previously and independently made."

Now, referring to that statement and to the exhibit which I have handed to you, do you have an opinion with respect to the effect on the market price of General Motors stock which this type of marketing would have?

A. This type of purchasing would have?

Q. Yes, sir, purchasing.

A. Well, I observe from these charts, which show trading in the three respective months of October, November and December of 1954 of General Motors stock on the New York Stock Exchange and in relation thereto the number of shares purchased by GM, that General Motors purchased some shares on almost every trading day of the month.

Q. I believe the exhibit also indicates that General Motors never made any high bid.

[fol. 1935] A. It appears to show that the average price paid by GM each day lay between the highest and lowest for those days.

Q. I think your description is more accurate than mine.

Do you have an opinion, sir, with respect to the effect on the market price of General Motors stock which transactions of this type would have?

A. Well, in my opinion the price of General Motors stock was increased to some extent by the introduction of this demand above the level it otherwise would have had.

Q. Do you have an opinion with respect to the type of marketing mechanism which was used to make these purchases; that is, whether it had the effect of reducing the impact on the market price or whether it did not?

Mr. Tierney: If the Court please, may I suggest that you call the witness' attention to the document which shows the method by which the stock was bought? You haven't done that.

Mr. Reycraft: The chart which he is examining——

Mr. Tierney: That doesn't have any indication. How about General Motors practice? Let him read that.

By Mr. Reycraft:

Q. At Mr. Tierney's request, I would like to have you read the two-page attachment to Mr. Hogan's letter.

A. Yes, I have read it.

Mr. Tierney: Mr. Reycraft, may I suggest the proper way, under what I understand the arrangement was when these documents were given to you, that the statement was to be made that this method of purchases was not disapproved by the S.E.C. The method was not disapproved.

Mr. Reycraft: I accept your statement on that. I have no reason to think otherwise.

[fol. 1936] Q. Having examined this document, which describes in some detail the mechanics of this purchasing, do you have an opinion as to its effect on the market price of General Motors stock?

A. Well, in my opinion the policies described for the acquisition of this stock for the Bonus Plan of General Motors was one designed to minimize the effect upon the price, and I believe it had that effect. That is, the rise in price or, to put it in reverse, the reduction in the fall of price of General Motors that would otherwise have occurred in the absence of the operation of the plan was less than it would have been in the absence of such a policy.

Q. You think, however, that the purchasing did increase the amount of rise in General Motors stock and decrease the amount of the decline in General Motors stock as those trends were becoming apparent?

A. Under what they would have been had the Bonus Plan acquired stock in a less well-calculated manner.

Q. You do think, then, that the mechanics by which the stock was purchased were relevant in minimizing the effect on the market?

A. Yes, I believe they were.

Q. Are you able to form any judgment from examining that exhibit and the other exhibit I showed you, Exhibit 538, of the quantity?

A. No, I am not. I have no doubt about the direction of

the effect that was had, but I would not feel qualified to express any view as to the amount of the effect.

Q. Would you have any judgment as to the comparative effect of comparing the mechanics which we have been referring to and the mechanics which I will describe generally as secondary distribution?

A. No, I would not. It is a subject on which I don't feel sufficiently informed.

[fol. 1937] Q. Do you think there is a means by which a comparison can be made?

Mr. Cox: May I have that question read, please?

(Question read.)

Mr. Cox: I object to the form of that question. What is he comparing?

By Mr. Reycraft:

Q. Compare, if you will, please, the mechanics, which I believe you said you understand, with a secondary distribution.

Mr. Cox: You mean the mechanics, whatever they are, in this document with the mechanics of a secondary distribution? Is that what the question is?

Mr. Reycraft: Let me change the second part of the comparison. To a purchase at a single time by a single purchaser.

Mr. Tierney: What are you comparing in that question, Mr. Reycraft? I don't know.

Mr. Reycraft: Does the witness understand the question?

Mr. Tierney: Well, I don't.

The Witness: I don't know what is being compared here.

By Mr. Reycraft:

Q. We have been discussing the mechanics which General Motors has in fact employed over a number of years to purchase General Motors stock on the New York Stock Exchange.

A. Yes, sir.

Q. You have testified, I believe, that in your opinion these mechanics are preferable to other mechanics which might be followed in that this type of mechanics has a

lesser impact on the market price of General Motors stock, is that correct?

[fol. 1938] A. I would suspect that it does have that effect, yes, sir.

Q. Now, are you familiar with any other mechanics by investment, banking mechanics or broker mechanics, if you will, by which such purchase could be made?

A. I have a very general knowledge, but I am not an investment banker and I really don't consider myself expert in that subject.

Q. You don't feel qualified to answer the question?

A. No.

Q. Now, examining the selling side rather than the purchasing side, what in your judgment would be the effect on the market price of General Motors stock of selling the same quantity of General Motors stock through the same mechanics as General Motors employs to purchase that stock?

A. Well, there would be—there is no doubt——

Mr. Tierney: I object to that.

Mr. Reycraft: The witness understands the question.

Mr. Tierney: Well, I want to make an objection.

The Court: What is the basis of the objection?

Mr. Tierney: The objection is that he is attempting to compare forced sales with voluntary purchases. There is no comparison, and no comparison can be made. He is trying to compare apples and oranges here.

The Court: I think the witness is capable of answering the question.

By the Witness:

A. Well, my answer would be that there can be no doubt and there is no doubt in my mind that a program of selling [fol. 1939] a million shares of General Motors stock will produce a lower price for the stock than would obtain in the absence of such a plan.

That is to say, we have here an addition to the floating supply of stock coming on the market without any new factor affecting the demand for the stock and the price must fall.

Q. And, on the other side of the coin you have a reduc-

tion in the floating supply of General Motors stock when it is purchased on the exchange, isn't that correct?

A. When it is purchased on the exchange you have a reduction of the floating supply, and other things remaining constant, including the factors of demand, the price will be increased.

Q. Now, as an economist, can you tell me how the relative impacts of the two situations we have been discussing would compare?

Mr. Cox: I object to the form of the question on the ground it is incomprehensible.

By Mr. Reycraft:

Q. Does the witness understand?

A. I am not sure I understand the question.

Q. Well, you understand that we have been discussing purchases by General Motors of its own stock, do you not?

A. Yes.

Q. You understand we have also discussed selling stock in the same manner through the exchange as General Motors purchases?

Mr. Bushby: I object, your Honor. It has been testified here that you cannot sell a registered secondary, a million [fol. 1940] or two million shares, by dribbling it in the auction market on the stock exchange. It has to be sold in a secondary.

Mr. Reycraft: This man is an economist and this may be a theoretical question, but I think it is certainly relevant.

The Court: Overruled. He may answer.

The Witness: May I have the question again, please?

Mr. Reycraft: Will you read the question, please?

(Question read by the reporter as follows:

"Q. You understand we have also discussed selling stock in the same manner through the exchange as General Motors purchases?")

Mr. Reycraft: I do not believe that is the full question.

The Witness: That isn't a question.

By Mr. Reycraft:

Q. The question is, comparing this, what I will describe in shorthand as the buying side and selling side of these

two mechanical procedures, are you able to form a judgment as to whether there would be a greater impact on the market on one side or on the other side?

Mr. Cox: I assume, Mr. Reycraft, that that question assumes that neither on the selling side or buying side is there any addition to either supply or demand.

Mr. Reycraft: We are talking about exactly the same quantities on each side.

Mr. Cox: Yes, but I take it you are not assuming a situation in which there is a demand one day and a supply the next day, or demand one day and supply that day and then the next day an increase in supply?

[fol. 1941] By Mr. Reycraft:

Q. Do you understand the question, sir?

Mr. Bushby: I would like to point out, your Honor, General Motors can buy its stock on the exchange without any registration but General Motors cannot go and offer stock on the exchange without registering and having a prospectus, and all that.

Mr. Reycraft: We may have some legal argument on that. That is a legal question, your Honor, and I think the witness can answer it inasmuch as he is an economist.

The Court: All right, he may answer.

By the Witness:

A. The question, as I recall, was how would I compare these two operations with respect to their effect on the price of the stock?

By Mr. Reycraft:

Q. Yes, sir.

A. I would be unable to say whether the effect of selling a given amount of stock in a certain month would produce the same percentage decline in the price of the stock as the purchase of that same amount of stock in the same amount of time would produce in percentage rise in pric I think I already testified to that effect.

There is no doubt in my mind as to the direction of the impact of the operation on the price. This is clear. The purchase program will tend to raise price above and what it

would otherwise be. The sales program will tend to depress it under what it would otherwise be.

Q. Are you able to form any conclusions as to whether [fol. 1942] one has a greater impact than the other?

A. No, not without considering the conditions of the market and the character of the supply and the demand for the stock in question.

Q. Assume——

A. I would not wish to make a general assertion.

Q. Assuming the same market conditions, you could not make a general statement in answer to the question?

A. No.

Q. What factors in your judgment would distinguish between the two situations?

A. Well, in the one case where we introduce a purchase program we would have to consider the elasticity of supply of the stock—"where is the stock which is sought to be purchased to be gotten from?"

In the case of the sales program we focus attention on the elasticity of demand for the stock— "Where are the buyers for the stock that is to be dislodged from the hands of the investors?"

I think we are involved in a little different kind of an analysis. Those are the things that I would wish to examine.

Q. Isn't it a fact that the purchaser who limits his purchases to a single commodity has a more difficult problem than the fellow who is selling to a great mass of prospective purchasers?

Mr. Cox: Can we have the question stated in terms so we know what a "difficult problem" is?

Mr. Reycraft: He seems to understand it.

Mr. Cox: He asked you once before to explain that phrase.

[fol. 1943] The Court: Does the witness understand the question?

The Witness: No, I am not sure that I do, your Honor.

Mr. Reycraft: Will you read the question, please?

(Question read.)

By the Witness:

A. Well, under the conditions which you have stated, I think this is true, but——

By Mr. Reycraft:

Q. Well, let's go on to something else, then.

Mr. Cox: Let him finish his answer.

—May it please the Court, may the witness be permitted to complete his answer?

The Court: Yes. Complete your answer.

By the Witness:

A. (Continuing) Well, what I was about to say was that ordinarily sellers are confronted with a variety of purchasers and purchasers are confronted with a variety of options as to sellers, and if we assume that a purchaser will not consider any alternative, certainly his elasticity of demand is less than if he had alternatives to consider.

By Mr. Reycraft:

Q. Does that complete your answer?

A. Yes.

Mr. Reycraft: Will you mark for identification as Government's Exhibits 539 and 540, two documents, one bearing the notation, "Item 3," in the upper righthand corner; and the second, a two-page document, headed, "Purchase Price of Bonus Stock Compared With New York Stock [fol. 1944] Exchange Daily Prices, October Through December, 1954"?

(Thereupon said documents were marked Government Exhibits 539 and 540, for identification.)

Mr. Reycraft: I offer Government's Exhibits 537, 538, 539 and 540.

Mr Burnham: Your Honor, General Motors objects except with respect to the two-page attachment to the letter, which I believe is 538. The two-page attachment describes the Bonus Plan purchase policy, but the other material, we see no relevancy at all to it.

The Court: You see no objection if the other is attached, is that your objection?

Mr. Burnham: No, your Honor. The objection is this, that 538—Let's take 538, first. It consists of a letter to the SEC, which is a brief or argument about Rule 10-XB, or something or other, and has no connection with this case.

But attached to it is a two-page memo which the witness used in connection with his testimony. We have no objection to the memo. We do object as wholly irrelevant to the introduction of the letter. The underlying data about prices of General Motors purchases of stock on the Exchange, and so forth, we think is also wholly irrelevant.

Mr. Reycraft: All of these documents, your Honor, relate to purchases in a large quantity of General Motors stock on the Stock Exchange and could hardly be more relevant.

The Court: What about the letter?

Mr. Reycraft: The letter also relates to the mechanics [fol. 1945] of the purchases. It relates to General Motors' discussions with the S.E.C. concerning the market impact of these purchases.

Mr. Burnham: The letter relates to the question of whether or not the policies which General Motors was then following and proposed to follow would be in violation of a particular rule of the S.E.C.

Mr. Reycraft: Because that rule prohibited manipulation of stock prices.

Mr. Burnham: And Mr. Reycraft admits that the S.E.C. has not disapproved of the policy. Now, the underlying memorandum, which does outline the manner in which the purchases were made, was used by the witness. We have no objection to that. However, we do object to the rest of this material as wholly irrelevant.

Mr. Reycraft: I think you will want to examine it, your Honor.

The Court: The Court will receive the charts and the memorandum, and will reserve its ruling as to the letter until after I read it. I would like to have a copy of the letter so I may read it.

(Said exhibits, so offered and received in evidence were marked Government's Exhibits 537, 539 and 540.)

By Mr. Reycraft:

Q. Now, in forming your opinion with respect to the impact on the market which you believe would occur from divestiture in this case, did you give any consideration to any specific secondary distributions, other than the Sloan offering to which you have testified?

[fol. 1946] A. No, I did not, for the reason that it seemed to me that each security presents a unique and separate problem of analysis.

Q. There is no relevance—the marketing problems with other securities would have no relevance?

A. No, I did not say that. I think there is a relevance but I believe it is only remotely relevant. The most relevant evidence has to do with the security we are concerned with, namely, General Motors.

Q. You think the sales of any securities other than General Motors would not be relevant or would be remotely relevant?

A. Only remotely relevant, yes.

Q. So that you did not consider them for that reason? All right. Did you give any consideration in the preparation of your testimony to the sale of all 63 million shares of General Motors stock rather than a distribution of two-thirds of it, approximately?

A. The sale of all 63 million at one time?

Q. Over any period of time?

A. No, I did not.

I considered only the consequences of the Government plan which calls for, as I understand it, the distribution of some 43 million and the sale of 20 million over ten years.

Q. And do I recollect your testimony correctly, that you gave no separate consideration to the sale of the 20 million shares of General Motors stock without the increment which you believe would be involved from the tax element?

A. That is correct.

Q. You gave no consideration?

A. I did not consider that separately, or attempt to evaluate that separately.

Q. And you would have no way to form an opinion as to the market impact at this time without a good deal of further study?

A. That is correct.

[fol. 1947] Q. Are you aware of any sources of increase in the supply of General Motors stock other than those you have familiarized yourself with involved in the Government's proposed judgment?

A. No, I believe not, that is, not of any special sources of supply coming out of the hands of investors.

Q. I refer you to Government's Exhibit 172. Column 2 of that exhibit refers to newly issued stock of General Motors Corporation which is involved in a savings stock program of that company.

In your judgment, would the addition of this supply, which over the last two years, I believe, is in the neighborhood of a million shares a year—would the addition of this supply be likely to have any effect on the market price of General Motors stock?

A. Oh, yes.

Q. Would you be able to measure that effect?

A. Not without analysis; but, in general, it was certainly true that the addition of newly issued shares to the floating supply would have a depressing effect on the market price.

Q. In your opinion——

A. (Continuing) Other things equal.

Q. It would have a depressing effect?

A. Yes.

Q. Are you assuming that those——

A. I am assuming for the moment that these shares are offered on the markets, security markets. If they are offered under circumstances where they are automatically placed in the hands of long term investors, then of course, they would not have such effect.

Q. If you assume this is part of a savings program for the employees, and the employees themselves have the stock, would that change your assumption?

A. Oh, yes.

Mr. Burnham: Mr. Reycraft, that is a misstatement of the record.

[fol. 1948] I object, your Honor. That stock is not even in the hands of the employees.

Mr. Reycraft: I am trying to be fair.

If you would like to describe it, I would like to have you do so.

Mr. Burnham: It is in the record, but you misdescribed it, Mr. Reycraft.

I am sorry, your Honor. I object to the question.

The Court: Overruled. You will have a chance to bring that out on redirect examination.

Mr. Reycraft: Read the question, please.

(Question and answer read.)

By the Witness:

A. As I understand it, the figures in Column 2 refer to the number of newly issued shares of General Motors common stock sold by General Motors to the trustee of the General Motors savings stock purchase program. And if I correctly understand it, these newly-issued shares are taken up by employees as they are received by the trustee. Therefore, they do not constitute an addition to the floating supply and would not have any price-depressing effect.

Q. Do you think they have any overhanging effect over the market?

A. No, I would judge not, because they are automatically taken up. They are taken out of the market, so to speak.

Q. And you assumed none of them were ever sold?

A. They may ultimately be sold by the General Motors employees, to whom they are issued; and at that time, of course it would constitute additions to floating supply and would have a depressing effect.

[fol. 1949] Q. At that time?

A. At that time.

Q. Do you have any opinion with respect to the advantage or disadvantage of registration of an issue of stock on the marketing problems?

A. Well, I have a general opinion.

It is my impression and observation that other things being equal, a corporation whose shares are listed for trading on the New York Stock Exchange or other national securities exchanges has a somewhat easier time of selling a given issue of new shares than a corporation that does not have that.

Q. Let me make myself clear.

Registration with the SEC was what I intended to convey.

Mr. Cox: Can you state a question, please, Mr. Reycraft?

By Mr. Reycraft:

Q. Do you know the question?

A. No, I am not sure.

Q. Do you have any opinion as to the difficulty of marketing an issue of stock which has been registered with the Securities and Exchange Commission prior to the offering?

A. And I am comparing such an issue with one not registered?

Q. Yes, sir.

A. But alike in all other respects?

Q. Yes, sir.

A. I would be inclined to think that the first issue could be marketed more readily.

Q. The registered issue?

A. Yes.

Q. Have you made any study of the rate of growth of pension funds over the past decade?

A. I have not made a specific study of this subject. I have seen figures that lead me to think they are growing very rapidly.

[fol. 1950] Q. I believe you testified that you did not study secondary distributions of stocks other than General Motors, in the preparation of your testimony?

A. That is correct.

Q. Does that testimony also apply to rights offerings?

A. Yes.

Q. You have never managed any secondary distributions, have you, sir?

A. No, sir, I never have.

Q. And you have never managed any rights offerings?

A. No.

Q. And you have never participated in investment banking other than as a research employee?

A. That is correct.

Q. And in your duties as a research employee, were you in charge of the department?

A. I was in charge of the research department; and its functions were generally to seek to evaluate the intrinsic values of various securities, so that we could advise our clients.

Q. How long were you so employed?

A. I was employed in that position one year.

That is 22 years ago.

Q. And that is your sole acquaintance with the investment banking field as an employee?

A. That is right, as a member of that industry.

Q. Did you give any consideration to the possibility that one or more persons might be engaged in purchasing a large block of this General Motors stock off the market or over the counter?

A. I didn't give consideration to over the counter purchases specifically, but I certainly did consider that when we are dealing with 3,300,000 shares a year, some purchases would probably be fairly large.

Q. You did consider that?

[fol. 1951] A. Yes. I assumed that purchases would be made in different quantities, and some would be large, and many would be small.

Q. What were the largest in range which you considered?

A. Well, I didn't study the subject especially. I didn't——

Q. Isn't it a fact that large purchases in large amounts would lessen the impact on the market?

A. No, it is not so. That is not so.

Q. That isn't true?

A. No, the large purchasers as a matter of fact usually insist on getting a better price because of the size of the purchase.

Q. If a large purchase is made, however, it would eliminate trading in that amount on the exchange, would it not?

A. Of course, but it also would help to depress the price in the process.

Q. How would that come about?

A. For the reason that the larger purchaser as an inducement to make a large purchase, usually seeks a better price than the small purchaser.

Q. He might want to buy it without paying his commission?

A. He is interested in getting the stock at the lowest price he can.

Q. You have related your testimony concerning market impact to the volume of trading on the exchange, I believe, so that to the extent that there were large purchases that

they would be removed from that source of effect on market price, would they not?

A. I did not take specifically into account over the counter trading in General Motors stock, that is true.

Q. Do you know how much over the counter trading there was in General Motors stock last year?

A. I do not.

Q. Do you think it is relevant?

A. Yes, I think it is relevant.

[fol. 1952] Q. But you did not study it in connection with your testimony?

A. No, I did not.

Q. In further explanation of your answer on the effect of a large purchaser buying stock at a discount, you testified that that would probably, in your opinion, be made at a discount price?

A. I think that is very likely, yes.

Q. But how do you conclude that it would affect the price on the New York Stock Exchange?

A. Well, the two prices, over the counter market and on the Exchange, are not unrelated. I assume that a large purchaser, being fairly influential as a buyer because he is buying in large amounts, would seek to get the best price he could.

Q. And he would relate the price which he wanted to pay to the then price on the New York Stock Exchange?

A. The buyer and seller usually use the New York Stock Exchange price, I believe, as a kind of basis for negotiation.

Q. Then the sale having been made off the exchange, how would the sale affect the price on the New York Stock Exchange?

A. By removing an element of demand for stock on the exchange. It would tend to depress the price on the exchange.

Q. It would tend to depress the price on the exchange because the purchase was made off the exchange?

A. Yes.

Q. Can you tell me why, sir, you did not consider the different mechanics of selling which might be employed in forming your opinion as to the effects on the market of any divestiture which might occur?

Mr. Cox: May we have that question read, please?

(Question read.)

[fol. 1953] By the Witness:

A. Well, I didn't take the different alternatives into consideration, not because they are completely irrelevant—they have some relevance certainly—but because, in my judgment, there were other more fundamental factors that were far more relevant which I did take into account.

Q. You think it is relevant but you——

A. That is, in dealing with the impact of a plan of this kind on the price of a security, there are an infinite number of factors that are relevant in some measure, and it seems to me the task of the analyst is to try to select those factors which are most relevant, because he has a limited time and ability to deal with them.

Q. And you think the mechanics of the distribution would be among the less relevant factors?

A. They were less relevant than the factors I took into account, in my opinion, yes.

Mr. Reycraft: I have nothing further.

Redirect Examination.

By Mr. Cox:

Q. In relation, Dean Jacoby, to Mr. Reycraft's last two questions, is it not a fact that you testified on cross-examination that so far as the mechanics of sale by the trustee were concerned, you assumed the sales would be made under the most favorable conditions?

A. I so testified.

Q. And in the most favorable way?

A. Yes.

Mr. Cox: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Reycraft: Your Honor, we haven't finished examin-
[fol. 1954-1955] ing the work papers. May we have them over the weekend?

Mr. Cox: No, I object to that, your Honor. Those work papers were not used as the basis for any exhibits.

We have not examined any work papers of the plaintiff's

witnesses except work papers that were used as a basis for statistical computations.

Dean Jacoby is about to leave. I think he should be allowed to take those papers with him. There is nothing in them that isn't in his testimony. He testified here, and the computations were explained on the stand.

Mr. Reycraft: He was reading from them regularly, and I think we are entitled to examine them further.

Mr. Cox: I object, your Honor. That has not been done heretofore in this case.

Mr. Reycraft: No one has asked for them.

The Court: I think he is entitled to examine them, but as to whether or not he should have them over the week-end is another question.

Mr. Reycraft: This evening is satisfactory to me, your Honor.

Mr. Cox: If it is your Honor's ruling that they can see the papers, they will be available in our office.

Mr. Reycraft: This evening?

Mr. Cox: No, tomorrow morning.

Mr. Reycraft: That is agreeable.

The Court: Very well.

(Thereupon an adjournment was taken in the above-entitled cause until Monday, March 23, 1959, at the hour of 10:00 o'clock a.m.)

[fol. 1956]

Transcript of Proceedings of March 23, 1959

The Clerk: Case on trial.

The Court: Counsel may proceed.

Mr. Cox: May it please the Court, I thought this morning I should inform the Court and other counsel that it now appears to us that the presentation of evidence on behalf of the du Pont Company will almost certainly be concluded sometime on Thursday. There is perhaps a slight chance it might be concluded on Wednesday. At least all of our witnesses will have appeared by that time. There may be a few pieces of documentary evidence left to be dealt with, but I think the presentation of oral testimony will certainly finish within the limits of time that I have mentioned, so that everybody can plan on that basis.

Mr. Tierney: Mr. Cox, I presume we ought to suggest to the Court that we propose to put on a witness for General Motors this morning.

Mr. Cox: Yes. I understand he is here in Chicago.

Mr. Tierney: He is here ready this morning.

Mr. Cox: It will be convenient for him to testify.

Mr. Reycraft: We have no objections.

The Court: That is agreeable with the court.

Mr. Horsky: The du Pont Company will call Mr. Caley.

CHARLES F. CALEY, JR., a witness called on behalf of defendant E. I. du Pont de Nemours & Company, after being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Horsky:

Q. Will you state your full name, please?

A. Charles F. Caley, Jr. C-a-l-e-y.

Q. And your address?

A. My business address is 151 Farmington Avenue, Hartford, Connecticut.

[fol. 1957] Q. And your home address?

A. 265 Mountain Road, West Hartford, Connecticut.

Q. What is your present position, Mr. Caley?

A. I am an assistant Treasurer of Aetna Life Insurance Company, Aetna Casualty & Surety Company and the Standard Fire Insurance Company.

Q. What are the relationship between those companies?

A. Aetna Life Insurance Company owns 61.6 per cent of Aetna Casualty. Aetna Casualty owns 100 per cent of the Standard Fire Insurance Company.

Q. Thank you. Will you state, Mr. Caley, your previous professional experience?

A. Well, I have been 17 years with Aetna Life and affiliated companies, and prior to that, eight years with New Haven Railroad. My railroad work was largely that connected with the plan of reorganization.

A. It consists of working on and preparing special reports and exhibits, all of which related to carrying out the plan of reorganization.

In 1942 I went with the Aetna Life as a railroad specialist. My duties were to assist the then head of the department in his activities as a member of several reorganization committees and to assume responsibility for their investment in railroad securities.

With the completion of the reorganization plans and at the decline in importance in our railroad investments, my work gradually became more in the field of equity investments.

In 1954 I was promoted to a junior officer and in 1956 made an assistant treasurer.

Q. Which is your present position?

A. Yes, sir.

Q. What college did you attend, sir?

A. Harvard.

[fol. 1958] Q. Are you a member of any professional societies?

A. Well, I am president of the Investment Group of Hartford. This is an organization, a formal organization of securities investment people from the banks and insurance companies in central connecticut and Western Massachusetts. It is like a security analyst society.

Q. Have you done any teaching in the field of insurance investments?

A. Well, I am an instructor at the Hartford College of Insurance, which is an extension of the University of Connecticut.

Q. What do you teach there, sir?

A. Insurance investments.

Q. Now, let me get some material in the record about the Aetna Life Companies themselves. How is the investment department of the three companies organized?

A. Well, our investment department serves the three companies. It is headed by a senior vice president and treasurer, who is also a director. He has the responsibility for the securities investments, for the mortgage loans, for the banking arrangements, and as a senior vice president is concerned with matters of company policy other than the investment of the funds.

There are five assistant treasurers, of which I am one. One of the assistant treasurers is also vice president.

Q. How is the investment policy determined in the company?

A. The Connecticut law directs that all investments of insurance companies, of life insurance companies, be approved by unanimous vote of the Finance Committee or the majority vote of the Board of Directors.

Now, the Finance Committee, which consists of senior vice president, the president of the company and four [fol. 1959] directors, who are not officers—meets oh, about weekly, to consider reports in the investment department.

Now, these are presented by the senior vice president and treasurer and they may concern individual issues of securities, they may concern groups of securities or there may be matters of investment policy.

Generally, the officer who has direct responsibility for the matter coming before the committee will attend to present more detailed recommendations following the presentation by the senior vice president.

Q. How does the procedure apply specifically with respect to common stock investments?

A. Well, there is some difference in that bonds are usually purchased in large amounts. They are usually of new issues and the authorization by the Finance Committee would specify the amount and there will be no further purchases. Common stocks are bought more or less on a continuing basis, so that the approval of the Finance Committee is there, but it takes the form of approving a list of companies from which the Investment Department may select stocks for purchase.

Now, sometimes the Committee will consider an individual issue for purchase or for sale, but for the most part our activities are confined to the stocks on a list, which is reviewed from time to time with the Committee and all purchases are reported to them.

They maintain their control, but the selection is pretty much in the discretion of the Investment Department.

Q. Are du Pont and General Motors both on the list at the present time?

A. Yes. They have been on as long as the list has been in existence.

Q. Now, in what way, Mr. Caley, do you personally par- [fol. 1960] ticipate in the company's common stock investments?

A. All matters with respect to common stocks are referred to me. I make the initial recommendation to the Senior Vice President and Treasurer. He makes all the final decisions for the department, but he relies on me exclusively for recommendations.

If it is a common stock matter to go to the Finance Committee, I will attend a meeting to present the reasons for our recommendation. This, of course, follows the decision by the head of the department.

If it is a matter of policy, my position is confined to preparing the material which will be required to make the decision or will be used in making the decision, making the initial recommendation to the Senior Vice President and Treasurer and attending the Finance Committee meeting to present explanations, if required.

Q. Are your recommendations generally accepted and effected?

A. Well, certainly matters dealing with individual securities are almost always accepted or they are effected, and that merely stands to reason. I have been associated with the present head of the Investment Department for 17 years and have discussed stocks with him almost daily, certainly during the last four or five years. I have attended every Finance Committee that I can remember at which common stocks have been discussed. There is no reason not to make effective recommendations.

Q. Now let us get a little bit in the record about the companies. Where do your companies stand as far as size is concerned with respect to the insurance industry?

A. Aetna Life Insurance Company has assets of 3 billion [fol. 1961] 550 million, which places it about seventh in size in the industry.

Q. In the life insurance industry?

A. That is in the life insurance industry.

The Aetna Casualty & Surety that is consolidated with Standard Fire has assets of 616 million, which makes it fourth or fifth in size in the fire and casualty industry.

Q. How much do each of the companies or all of the companies have invested in common stocks?

A. Well, on December 31, 1958, the latest date of the published holdings, Standard Fire owned about 7.4 million of common stock; Aetna Casualty 157.3 million; Aetna

Life 79.4 million. The total comes to about 240 million dollars. That is the three companies' total.

Now looking at Aetna Life alone, there is the 79 million of common stocks, plus an investment in the Aetna Casualty & Surety of 127 million.

Q. That is at 61 per cent interest?

A. That is 61 per cent interest in the affiliate, which is carried in the Aetna Life's accounts at its book value.

The Aetna Life then reported holdings of common stocks, including the casualty, would be 207 million.

Q. How much, Mr. Caley, if you can give us an estimate will Aetna Life have available for investment—the "Life" now—have available for common stocks in the next few years?

A. Well, that is quite a difficult question to answer. Presumably, we will have money available which could be invested in common stocks, but I might elaborate a little on that.

In the first place, Aetna Life hasn't bought common stocks in the past—well, since 1951. There are several reasons for that. One is that our present stake in common stocks is relatively large. Whether you take it on the basis [fol. 1962] of the Aetna Casualty, plus other commons, or whether you take it on a consolidated basis, which means just the 61 per cent of Aetna Casualty's investments—and that would be—well, take 61 per cent of 160 million would be around 99 million, and adding that to the 79 million of other commons would produce a figure of about 178 million. And even if you use the lower figure, the 178 million, that amounts to about 5 per cent of our admitted assets, and it is about 46 per cent of our investment, of our capital surplus contingent reserve, and security valuation reserve —about 46 per cent.

Now on an industry basis, that is relatively high. There are only two companies among the sixteen largest—those are the ones with assets over a billion—which have a higher percentage of their assets invested in common stocks; and there are only three which have a higher percentage of their surplus accounts invested in common stocks. Consequently, we have what must be regarded as an adequate position. That is one reason why we haven't been buying commons.

Another is this relationship between Aetna Life and Aetna Casualty and the method of carrying the Aetna Casualty on the Aetna Life books at the percentage of book value; so that adding common stocks to the investment in Aetna Casualty investments has the effect of increasing the exposure of Aetna Life to fluctuations in market value of common stocks.

Now, finally, which has considerable significance right now, we are faced with a new income tax law; we are faced with a substantial increase in our income taxes, and we are not quite sure just what the relative merits of cor- [fol. 1963] porates or other taxable bonds are, tax exempts and stocks would be. I know we haven't considered it yet. It is hard enough with matters of bonds.

Q. Well, let us turn from the life insurance company then to the casualty company.

Can we consider them together, Aetna Casualty and Standard Fire as one entity?

A. Yes, I think that is quite appropriate.

Q. If we can, let me ask you how much they would have for investment in common stock?

A. The Fire and Casualty Company—that is, Aetna Casualty and Standard Fire, have a fairly substantial cash flow; but in the end, what we will have available depends on our additions to surplus as the amount of retained earnings.

Q. Would you explain why that is so?

A. I think it follows—well, it's a matter of principle in investing institutional funds that any institution which has liabilities to others, and which must report a balance sheet, should consider or generally does consider the amount of its surplus when it is considering investments in assets that fluctuate in value, rather than the total amount of its assets.

For example, if the value of an institution's assets are only slightly greater than its liabilities, then, obviously, a small decline in that value of the assets will substantially reduce the difference between the liabilities and assets, which is of course, the surplus.

Now if a company is satisfied that its investment in common stocks bears an appropriate relationship to its surplus funds, then it follows that no money available for common stocks would depend on the amount of the additions to surplus rather than the increase in assets.

Q. Is this principle you are stating generally applied, [fol. 1964] so far as you know, in the casualty and surety business?

A. Well, throughout the field of fire and casualty insurance investment policies, I think it does apply. I think any study will show that it definitely does apply.

In the first place, we must recognize that fire and casualty companies are not restricted in any practical way by the statutes, as far as their investment policy is concerned.

Now the 1958 results are not generally available, but certainly as of 1957 there was only one company among the larger ones, say, the 20 or 25 largest, only one company on a consolidated basis, whose common stock investments exceeded the amount of its capital and surplus funds, that is, its surplus to the policy holders; and that was only by a small margin.

Now, there are several strong companies, financially very strong companies, whose investment in common stocks comes close to the amount of its surplus to policy holders; but the industry average is quite a bit less.

Q. What is Aetna's position on that? How close or how does your investment in common stocks compare with your surplus?

A. Well, the Aetna Casualty & Surety, consolidated, has 160 million in common stocks, and capital surplus and contingency reserve of 206, or 207 million, which makes the proportion, say, around 79 per cent of its capital funds in common stocks, capital and surplus funds in common stocks.

Now, it is also customary to consider preferreds as assets that fluctuate in value, so that if you add to the 160 million the 22 million or so of preferreds, then the total of [fol. 1965] 182 comes very close to 90 per cent, for capital surplus and contingency reserve.

Q. Can you give us some idea as to how much your purchases increased in the past five years? How much have you invested in common stocks during the past five years?

A. Well, during the past five years——

Q. This is the casualty companies I am speaking of.

A. We have invested a little bit less than six million dollars annually in common stocks, or a total of about 29 million. Against that we have had about a $26 million

increase in our surplus funds, and something like 145 million dollars increase in our liabilities.

Perhaps the last two years are even more significant. Our investment in common stocks has amounted to a little under 12 million against an increase of only three million in surplus, and perhaps about close to 80 million in liabilities.

That is, we have had a good cash flow of in excess of 80 million, but most of that money has been because we incurred greater losses in our underwriting, and that must be reserved for, and it is largely bond money, on the basis that if liabilities should be covered by bonds and cash, which is, in the long run, I think, the general principle, most of our cash funds have been available only for investment in bonds.

Q. I would understand your answer to be, then, that you are somewhat increasing your proportion of surplus which is invested in common stocks?

A. Yes, that is true. We have had a definite objective of increasing the amount of our surplus funds invested in com- [fol. 1966] mon stocks. We started out with that idea about four years ago.

Q. Have you set a ceiling that you are not going to exceed in that respect?

A. Well, we haven't actually set a formal ceiling. The Committee has in mind an objective or at least a target, perhaps, of a hundred per cent of our capital and surplus funds invested in common and preferred stocks. I don't know exactly what would happen after that was reached.

Q. On that basis, how much more could you invest before you reached that as of the present time?

A. Well, let's see, we have common and preferred stock investments of 182 million; capital and contingency reserve of about 206 million. That figures around 22 or 23 million dollars gap or margin.

We have no idea that that is going to be closed in any definite period of time. And looking at that, we might be inclined to hope for opportunities to invest under favorable circumstances and find additions to the increase in our surplus.

Perhaps about the only thing we could say about the money that the Casualty Company has available for investment is to look at the record, which has been about six

million a year, and expect that maybe that is about the rate we will continue.

Q. Just so that we will be clear, this 100 per cent of surplus policy that you have been talking about is for fire and casualty companies, is that right?

A. Definitely, oh, yes.

Q. Would it apply to life insurance companies?

A. Oh, I think not. I think you could go back to this matter of relationship of surplus funds to liabilities and the amount of surplus funds. The fire and casualty industry [fol. 1967] has a much larger surplus in relation to its assets or its liabilities than the life insurance industry has.

Now, keep in mind, too, that fire and casualty companies haven't been restricted by any statutes yet on an industry average; I think that the proportions will come close to those of Aetna Casualty, that is, about 80 per cent of their capital surplus and surplus reserves invested in common stocks. This is an industry average.

Granted there are some companies who are very strong and have very strong surpluses, and can invest larger, and always have invested larger amounts in common stocks. But the surplus funds of a strong fire and casualty company would be equal in that amount to its liabilities.

Now, when you look at life insurance companies, surplus funds are very small in relation to liabilities or assets. But on the average, they might be no more than seven or eight per cent of the liabilities compared with a strong fire and casualty company where it runs equal to liabilities.

Now, under those circumstances, it is hard to visualize a life insurance company Finance Committee with responsibility or the directors investing all of their surplus funds in common stocks. After all, you can't rule out depression. You can't say that it won't happen again.

It isn't the case of saying that the common stocks would be worthless, but there has to be some margin in the event of seriously disturbed business conditions and defaults on bonds.

Nor is it a case of having surplus funds wiped out completely, because, even if they are reduced by changes in the value of the assets, it means that the company's activities are restricted, certainly with respect to investments, [fol. 1968] and, well, in the fire and casualty field, would be restricted with respect to their insurance operations as

well. I would not expect to see it in the life insurance industry as well.

Q. All right. Now let's turn to the specific stocks that are in issue here. Have you got some figures there, Mr. Caley, so that you can tell us the amount of your companies' investment in du Pont and General Motors, and the proportion of your common stock portfolio that they represent?

A. Yes. I have a sheet here that just takes information from our yearbook, if I may refer to that.

Q. That is all right. That is the figure as of December 31, 1958?

A. That is right.

Aetna Life owns 5400 shares of du Pont, which amounted to 1½ per cent of their common stocks.

Aetna Casualty owns 22,200 shares of du Pont, which is 3 per cent of their common stocks investment.

These are all at market.

The total of the companies—I was referring to Aetna Casualty consolidated and Standard Fire. Total holdings are 27,600 shares of du Pont, which are about 26½ per cent of our investment in common stocks.

Aetna Life doesn't own any General Motors, but Casualty owns 50,205 shares. Market value at the end of the year was equal to 1.6 per cent of Aetna Casualty's investment in common stocks. As a percentage of the total of 240 million of common owned by the three companies, that is a little over 1 per cent.

Q. Have you read, Mr. Caley, the judgment proposed by the Government to be entered in this case?

A. Yes, I have.

Q. Will you state, just so we are sure, what you under-[fol. 1969] stand to be the basic propositions of that proposal?

A. In general, that is from the point of view of our industry, the proposal is that du Pont and Christiana distribute or sell all of their 63 million plus shares of General Motors. 43 million of those would be distributed on the regular annual basis for a period of ten years. The remaining, somewhat under 20 million, would be sold for all practical purposes on an annual basis.

There may be more leeway, but the 20 million would have to be sold over about a ten-year period.

Q. I think that is adequate for my question.

Let me ask you this on the basis of that: would you in the event that judgment were ordered by this Court as a final decree in this case recommended that Aetna Casualty purchase additional shares of General Motors common stock?

I limit to Aetna Casualty, because I understand Aetna Life probably wouldn't, anyway.

A. That is right. I don't think I can answer that without qualification, because, in my mind, I would recommend that only in the event of a very favorable price.

Q. Could you give us some indication of how you would define, if you can, what a very favorable price would be?

A. The record shows that the price of General Motors common stock has varied from 7 per cent and 10 per cent of the Dow-Jones Average during the past five or six years.

Q. I take it when you say the record, you are not referring to the record in this case?

A. No, sir. I mean the historical record of the price movements.

Now, in the normal course of events, I would expect to see that same kind of a variation continue into the future. [fol. 1970] Now, when the fortunes of General Motors were on the rise and the automobile industry, then I would expect perhaps the price of General Motors would be rising somewhat faster in the market and would be approaching the ten per cent figure.

When things were reversed, and when General Motors and the automobile industry were in a declining phase, I would expect to see the price declining towards seven per cent.

Thus, if the Dow-Jones average was 600, then General Motors might sell anywhere between 42 and 60, depending on, well, a lot of things, but particularly the fortunes of the automobile industry.

Now, these are what I would expect under normal conditions. Perhaps I should point out that one of the reasons I think I am justified in looking at General Motors on that basis is that the Dow-Jones average is made up of a group of companies which, to me, represent a fairly good cross section of economy. They are certainly not the fast movers. They are large companies and there are some which could be characterized as growth and some that are definitely not growth, but it is representative.

To my mind General Motors is a representative company in this sense; that is over the long term its fortunes will pretty much move with the aggregate of the economy, population, income and so on.

That this is a fair method of evaluating General Motors because of the characteristics of the average and because of the characteristics of General Motors. Now, this is under normal circumstances.

If we introduce an abnormality, that is imbalance between supply and demand of the stock, the chances are that [fol. 1971] this range in price of General Motors compared with Dow-Jones will change.

I would expect to see it, instead of ranging between 7 per cent and 10 per cent, somewhat lower.

Under those circumstances, I don't think I would make a recommendation to buy unless it were, say six per cent or lower.

Q. 6 per cent or lower, did you say?

A. That is right.

Q. Perhaps I can take it—well, let me ask you then, do you believe, Mr. Caley, that the judgment proposed by the Government if it were approved and put into execution would lower the price of General Motors stock below that which it would have if there were no such plan?

A. I don't see how it could help but lower the price.

Q. Would you explain why you think so?

A. We have a situation in which the demand will not be changed as far as I can see, that is, demand in relation to what it would otherwise be or in relation to stocks as a whole. That, I don't see, changes.

On the other hand, we have a decided difference in the supply. Here is something that can be seen, fastened onto. Something like two million shares to be sold at perhaps intervals of a year, maybe a little more, maybe a little less.

It seems to me it can be moved only at a price which investors will regard as more favorable than would otherwise perhaps be available.

Q. Well, let me come back to the question I asked you before. Would you recommend, in the event the plan were put into execution, that the companies purchase any additional shares of General Motors?

A. Well, let me explain a little further.

[fol. 1972] In the first place, we own 50,000 shares of

General Motors. We regard that as a representative investment.

In the second place, we are dealing with a company which is a cyclical industry. Now, I haven't any idea what the cycle is, but there is one, and it seems reasonable to expect that that characteristic is going to continue.

So that getting back again to normal market conditions, because we have a representative position, well, then we would be inclined, since it is cyclical, to add to our General Motors investment only at what we would consider favorable prices under normal conditions.

That might be the lower part of the range to which I was referring, that is, seven to seven and a half, maybe up to eight. That is, we would confine our buying to those kinds of periods.

They might be three or four years apart; but we would then be buying General Motors in relation to our purchase of other stocks at a favorable price.

If the Government plan goes into effect, then we have something else. In the first place—or let's go back to the fact that I believe General Motors is a cyclical kind of stock, cyclical as far as the average stock is concerned.

Sooner or later we would have the combination of forced sale—I will define that a little bit more. The prospect of the sale of almost two million shares, plus the prospect of declining earnings or perhaps even the actual evidence of declining earnings.

Under those circumstances, I don't think many people would buy except at such a price as would discount almost any kind of a decline.

After all, when earnings are going down, no one ever [fol. 1973] knows how far they are going down, whether it is in the aggregate or whether it is in an individual company. Consequently, the stock tends to drop rather precipitously.

It tries to anticipate the decline. This is a very general statement. When you impose on that the prospect of additional shares coming on the market, even if it is almost a year away, it seems to me that no one would do any buying and that price might decline to—well, you might have a completely disorganized market.

Now, under those circumstances, remember, we are willing to take the risk of the cyclical changes and we have an idea of how we would buy General Motors, but to impose

this abnormality, then I think that we would buy it only on the basis of an absurdly low price, because of this additional risk.

Now, there is one other minor reason which might be taken into account, and that is on any individual investments you have the risk of deterioration from internal causes. Now, I guess General Motors is one of the least likely to have that happen, but it could happen and it is not something we regard as likely, but in the event that it should, I should hate to have to join the sellers in a situation like that which would develop from the Government's decree.

Q. Would your position, Mr. Caley, be different during the early part of the ten-year period than it would toward the end of the ten-year period?

A. Oh, yes, there is no doubt about that. In fact, the early part of the period I think we just would not buy, I mean, because of these things I have mentioned—our position, the cyclical risks. We just would not buy in the early part, I do not think, except, again, at an absurdly low price.

[fol. 1974] Now, as we get toward the end of the period, obviously, things will be different, but that is looking quite a bit ahead.

Q. Doesn't your answer indicate that you would be selling any of your present holdings of General Motors?

A. I do not think we would sell any of our present holdings with the exception of the—that is, under the Government decree, we would be getting——

Q. Well, let's first take the ones that you now own.

A. No, no. I do not think we would sell.

In the first place, if the Government plan were adopted, it seems to me it would be a rather poor time to sell it. I honestly do not think we would get a price.

Q. Well, now, let's take up the other parts. I think you were going to mention under the Government plan both Aetna Life and Aetna Casualty would receive some General Motors stock as dividends on their du Pont stock. Would you keep that or would you sell that?

A. On the Life Company we would be getting something like 746 shares a year. Now, that is an awfully small investment for a company of over 3 billion in assets, and I cannot imagine continuing to hold that.

We would be selling probably the Life Company shares.

The Casualty Company, I believe would continue to hold the General Motors shares received as a dividend.

Q. Has General Motors been purchased by Aetna Casualty during the last few years?

A. No, we bought our last General Motors in 1955. We bought some in '54, but not since.

Q. Have you recommended the purchase of additional shares to the Finance Committee during that period?

A. No. As I mentioned earlier, General Motors has been [fol. 1975] on our list of stocks in which we can purchase with our own discretion in the Investment Department. It has never been a Finance Committee matter, although I think that it should be pointed out they never suggested that we should buy it.

Q. Yes. Have you recommended the sale of your present General Motors to them?

A. No. After all, we regard General Motors as being an outstanding organization in a very difficult field. There has never been any inclination to sell our General Motors. We just do not sell the stocks of companies that we regard as well managed and appropriate consistent with our objectives.

Q. Well, let's turn now, Mr. Caley, to the common stock of du Pont. Now, make the same assumptions that we have been operating on before, that the Government plan is ordered by the Court and put into execution. Would you think that that would have the effect of decreasing the price of du Pont stock below what it would otherwise have been?

A. It seems to me that—well, I think to begin with you have the General Motors component in the price of du Pont. That alone will certainly cause the price of du Pont to decline.

Q. You think it would decline?

A. Oh, yes.

Q. All right.

A. For that reason, if no other. Now, here again is evidence of a change in supply-demand relations. There are individuals who would have to sell. That I know from my conversations.

It seems quite reasonable to expect selling from trusts where the administrator or the trustee is unable to solve a

problem of allocating the General Motors shares to income or principal.

[fol. 1976] Q. Would you recommend the sale of the du Pont common stock your companies now own in the event the Government plan were put into effect?

A. No, no, I do not think so.

Q. Are those the same considerations that apply there as apply in the case of General Motors?

A. Oh, no, no. I think that the position of du Pont is substantially different. General Motors, here we have something very specific. That is, the trustee's sale.

Now, there will be additional selling of General Motors, we expect, but—and it will probably be unorganized, but in that sense maybe it is the kind of selling that would develop in du Pont, but in the case of General Motors we have the trustee's sale, and in addition we have the cyclical nature.

Now, it is the combination of the two that concerns me more than anything else. The fact that in a period of ten years it is almost inevitable that you will have the two come together, and under those circumstances I would expect chaos.

In the case of du Pont, there we have something that from my position I am not very well able to judge. Certainly the price would be lower, in my mind, so that we very likely would have to ask around among investment bankers and brokers. I don't know how far down the price of du Pont would go.

Q. Would you recommend the purchase of additional shares of du Pont at the lower price that you expect for your company?

A. Well, there again I cannot quite make up my mind what the price would be.

[fol. 1977] There are not quite the elements. DuPont's earnings are cyclical to a degree, but it is not as predictable; it isn't the same kind as General Motors, and I wouldn't expect those two things to come together. Maybe they will.

But on top of that is the problem of deciding when you buy du Pont—certainly in the initial stages you are getting more General Motors—and what are you paying for the chemical company? What are you paying for the additional General Motors shares? And it is the kind of thing that is difficult to explain to a finance committee. It isn't a matter

of their not understanding, but there is no compulsion to buy any one stock or any two stocks. In fact, the problem is to make a selection from a great many stocks.

My belief would be that the finance committee would decide that we should wait until it is clearly a favorable price, and I am not sure where that would be.

Q. Have you bought any du Pont recently?

A. We bought du Pont consistently in 1954, 1955, 1956, and even 1957—1500 to 1900 shares a year. In 1958 we only bought 400 shares, and one of the reasons was the pending litigation.

Q. Mr. Caley, is it your opinion, in the event the Government plan were ordered and put into execution, that General Motors and du Pont would remain on the list of stocks that you would buy at the Investment Department's discretion?

A. Well, the complications are so numerous, in this particular case, I think the Investment Department would sort of give it back to the Finance Committee. That is, if they didn't request that we take it off the list, we would recommend that it be taken off the list and any action would be the result of a specific meeting on that subject.

[fol. 1978] Q. Now let me change the assumptions a bit.

Assume, in addition to the assumption that you have been making that the plan of the Government is approved and put into execution, that du Pont announces its intention or, if you will, is required by the Court to distribute 43 million shares, which are to be distributed annually to du Pont stockholders, other than Delaware, Christiana and the stockholders of Delaware, as a substitute for its regular cash dividends.

How would that change the answers you have given, first as to General Motors, if it would?

A. Well, I think it would with General Motors. There would be even more disorganized selling.

Q. By whom?

A. Well, it would be those people, certainly, who would need cash to live on. In the case of—well—they would probably be the chief sellers; but it makes it a little bit worse; no better, as far as the impact on General Motors is concerned.

And you still have that two million sales. There is no change.

Q. Keep your voice up a little bit, Mr. Caley, so that we can all hear you.

A. Yes.

Q. How about the effect on du Pont stock? Would it change your answers in that respect?

A. Even that is difficult to say. Du Pont would, to my mind, be changed in character.

One of the reasons we have always favored du Pont is that it has done so well in investing its retained earnings, so that it could afford to pay out a substantial portion in the form of dividends, and still maintain its progress.

Now, whether du Pont could invest profitably the addi-
[fol. 1979] tional sum is a question in my mind. I shouldn't like to see it, and I can't imagine du Pont doing it; because, for instance, if it were invested in the chemical industry, it might well affect the earnings of all chemical companies, because I don't think the industry can use it. There is a lot of excess capacity now, and it would make that situation worse—and, well, it could easily cause trouble for du Pont, trouble with, for example, the Government or the Department of Justice.

Q. Suppose it were 50-50, Mr. Caley; suppose du Pont paid out half of its regular cash dividends in cash, and half of it in General Motors stock? What would that do to your answer?

A. Well, that seems to be a matter of degree. I suppose you could vary the proportions and hit one just right that would give du Pont a little money to invest and might be able to find a very profitable application for it; but offhand, I don't—not offhand, actually—but I fail to see that that would make any material difference in my conclusions with respect to buying these stocks.

Q. Now let me change the assumption once more. Suppose that we have the Government plan, the 20 million shares to be sold, 43 million to be distributed, which will be accomplised not in a ten-year period, but over a twenty-year period? How would that change your approach to—let us say, first to the purchase of General Motors Stock?

A. That means the increase in supply relative to this demand would be less, and I suppose that the logical implication is that the impact on the price would be less.

On the other hand, when you talk about General Motors, go back to the premise which I started this with, and it is

the impact of selling, plus a decline, a cyclical decline in [fol. 1980] sales or earnings, which I think, in the case of a ten-year distribution, could cause a disorganized market in General Motors, if or when they coincided.

Now if it is a twenty-year distribution—well, even something under a million shares might be pretty hard to sell under those circumstances; and there would be the risk then, even on a twenty-year basis, of a precipitous decline in price of General Motors, which might be covered quickly or it might hold at a lower level for a while. We would be inclined to go very slowly in the first part of it, anyway, and still look to buying General Motors only on the basis of a very favorable price.

Q. How about du Pont on a twenty-year-plan?

A. On a twenty-year plan, you would have the same people selling, the individuals, and the trustees. Du Pont has been one that I am not too sure of action; but we would have the General Motors component in the price of du Pont to consider, which would certainly bring it down, and we have the fact that acquiring du Pont means more General Motors, and how much we pay—we'd still have that. The degree might be different, but again, I don't think we would be buyers in the early stages.

Q. Now, Mr. Caley, let me ask you this question.

Have you read the du Pont plan?

A. Yes.

Q. Do you think that if that plan were ordered by the Court and put into execution, it would have any adverse effect on the market price of either General Motors or du Pont?

A. No. It seems to me we would be doing just about what we do now, or have been doing in the past.

Mr. Horsky: That is all.

You may inquire.

[fol. 1981] The Court: The Court will stand recessed for ten minutes.

(A short recess was taken.)

The Court: Counsel may proceed.

Cross-examination.

By Mr. Reycraft:

Q. Mr. Caley, when did you first begin studying your testimony in connection with this case?

A. Well, when you say study——

The Court: Would you draw your microphone closer and speak louder? I don't hear you well.

By The Witness:

A. When you say study, I think it is hard to say. I have been studying General Motors along with many other stocks for a long time. As far as this particular proceeding is concerned, reading the record, and so on, that has been comparatively recent, but at intervals.

By Mr. Reycraft:

Q. When did you first read the Government's plan, sir?

A. Four or five months ago.

Q. Did you undertake any studies in connection with your testimony other than reading the Government's plan?

A. Studies of what nature, sir?

Q. Studies to establish or as a foundation for the judgments which you have expressed this morning.

A. I think I have had the judgment with respect to the market action of General Motors in relation to the Dow-Jones Average for several years.

[fol. 1982] Q. You had that judgment as to the price at which your company would be interested in buying General Motors stock, is that your testimony?

A. Yes, that is true.

Q. So that you think right now General Motors is simply out of your buying range, is that correct?

A. Well, no, not out of our buying range. General Motors at its present price in relation to the Dow-Jones, if there were no other factors such as this litigation, would be approaching a buying range. We would be considering it. I don't know that we would be buying it, but we would certainly be considering it.

Q. When did your company or any one of the three companies last buy General Motors stock?

A. 1955.

Q. Has General Motors been within the range of your consideration since that time in respect to its price?

A. No more so than recently.

Q. What has been the range of General Motors price since 1955, since you last purchased the stock?

A. Since we last purchased it. Well, now, I am referring to the relationship with the Dow-Jones Average.

1955, especially at the time of the split, General Motors was rising very rapidly and was approaching that 10 per cent, and we stopped buying it.

Q. It was selling at 10 per cent of the Dow-Jones Average at that time?

A. Yes, adjusting for the split. Towards the end of 1955, it did reach close to 10 per cent of the Dow-Jones. We had stopped buying prior to that.

Q. And what is the percentage it sells for now?

A. Well, it would be around 7½—isn't it?

Q. Did you examine the testimony of any of the other witnesses in this case in connection with your preparation?

A. I examined the testimony of some of the Government witnesses.

[fol. 1983] Q. Which ones?

A. Doctor Friend, Mr. Carrol Shanks, Doctor Emerson. I examined it. I don't think I studied it.

Q. I am not sure I have received a specific answer to this question. Did you conduct any studies yourself in connection with your testimony?

A. You mean with respect to our attitude towards General Motors?

Q. Yes.

A. No real analysis of the market price beyond that which I customarily considered recommending General Motors and this range of 7 to 10 per cent, in fluctuations, is an opinion I have had for, well, certainly since our last purchase.

Q. So that irrespective of the factors which would influence the price of General Motors, this is the range which you would consider attractive for whatever reason?

A. Well, I don't want to imply that the range is attractive. The range is that over which it fluctuates. It would be attractive to us for purchase in the lower area of that range, which would be, well, it might be eight per cent

or lower. Again, it depends upon other things that we are doing with our money.

Q. Well, do I understand from your testimony that you have formed the opinion that there would be some tendency toward that lower range or that it would reach the lower range as a result of divestiture in this case?

A. As a result of divestiture?

Q. Yes.

A. Now, I would like to repeat what I said, and it was that because of the nature of General Motors principal business, it is cyclical, and it will tend to swing in the normal course of events in relation to the Dow-Jones [fol. 1984] average, which from an earning standpoint is more stable. At times it would be rising toward 10 per cent, at times it would be declining toward seven per cent. I didn't predict when it would happen.

Now my point was this: That imposing an imbalance of supply and demand at a time when it was in a declining trend, to me the consequences would be inevitable. It would push the price below what might have been otherwise historically. Now, I don't know how far down it would go.

Q. What, in your judgment, are the most important factors influencing the price of General Motors stock at the present time?

A. The price of General Motors in relation to the price of other stocks, or the price itself?

Q. Well, let's take it in relation to the Dow-Jones average, since you have used that as a valid basis of comparison.

A. I think that this litigation has an effect on the price. I would expect it to sell at a somewhat higher price in relation to the Dow-Jones.

Q. You think General Motors would be selling higher now in relation to the Dow-Jones average absent this litigation?

A. Yes, I do.

Q. Do you have a judgment as to how much?

A. I don't think it is possible to say precisely what a price ought to be. I think it is impossible.

In my judgment, it would be tending toward the middle of the range, maybe around 8½ per cent, eight per cent.

The reasons I say that is that this stock, like a lot of others, rather, this relation which I pointed out, is not

something that changes every day. It is fairly long term.

Now, as I mentioned before, in my judgment and for Aetna Casualty at its present price, which is approximately, [fol. 1985] well, we will say 7½ per cent of Dow-Jones, it is possible that we might be buyers of General Motors. It is possible that others might be buyers of General Motors. Historically, it looks fairly attractive compared to other stocks, and under those circumstances I would expect its price to be higher than it is.

Q. Now, did this litigation influence your judgment as to purchases of General Motors stock prior to June 3rd of 1957?

A. Would you say that again?

Q. Before the Supreme Court opinion?

Mr. Horsky: Will you repeat the question? That is what he asked.

By Mr. Reycraft:

Q. Did this litigation influence your judgment or your company's policies or decision with respect to purchasing General Motors stock prior to the Supreme Court decision in this case?

A. No, we hardly paid any attention to it.

Q. How soon thereafter did you begin to be influenced by this litigation?

A. As soon as the terms of the proposed Government decree were known. I can't tell you exactly when that was, but I know that to be so from just a conversation with one of the members of our Finance Committee who was kind of disturbed about it.

Q. So there would be a period of at least two years when you weren't buying General Motors stock for reasons unrelated to this litigation, is that correct?

A. Yes, it was price.

Q. The price of General Motors?

A. Yes.

Q. You think it was overpriced?

A. It was in the higher part of the range. Whether it was overpriced or not——

[fol. 1986] Q. As far as you were concerned, it was overpriced?

A. Yes. I guess that is a fair statement.

Q. Now, I have asked you what you consider to be the major factors in determining the price of General Motors stock. You have referred to this litigation as a factor. What other factors, in your judgment, influence the price of General Motors stock?

A. As a general rule?

Q. Yes, sir.

A. Well, it would be the prospect for earnings and dividends, which in turn would be related to the prospect for the automobile industry and investors' appraisal of the automobile industry; the concensus of their appraisal, which is sometimes not in accord with the facts or the problems of investing, deciding when the concensus is perhaps biased in one way or another, that leads to buying and selling decisions.

Q. Would it be correct to say that the major factor in influencing the price of General Motors stock is its prospects in the automobile industry?

A. I think you would say that with respect to almost any stock as a general proposition. I don't think by any means it is the only aspect of common stock prices.

All you have to do is look at the record. The stocks will remain unpopular for various reasons for a long period of time. They remain or will become unjustifiably popular for long periods of time. It is always pretty hard to say just what it is.

If it were only earnings and dividends or the prospects thereof, this would be a much easier kind of business.

Q. Do you know of any factor which is more important in influencing the price of the stock than the company's prospects in the business?

A. Again, if you are talking about a general proposition, I suppose there is no other single factor in the normal course of events.

[fol. 1987] Q. You think that, however, there may be factors introduced into the market which could affect the price irrespective of the company's prospects in the business? I take it that would be your judgment?

A. I think there is clearly evidence of that in a great many stocks.

Q. I take it that when you testified that this litigation had some effect, in your judgment, on the present market

price of General Motors, you related that factor to the market?

A. I have related that factor to the market? Do you mean that I have explained the market——

Q. You gave it some weight in reaching your judgment as to the relative price of General Motors with respect to Dow-Jones average?

A. Well, I gave it some weight because my interpretation is pretty much that of a person who has to look at a great many stocks, and that might not be absolutely true.

If it were a matter of great concern, if for some reason or other I had to get an answer to that question specifically, I would ask those who I believe had better judgment as far as these experience factors, or rather the abnormal things are concerned.

Q. And who did you consult in that connection in relation to this case?

A. Who would I?

Q. Who did you?

A. Well, I did not consult anybody.

Q. You are relying now strictly on your own judgment?

A. Oh, yes.

Q. So that for whatever may be the basis for your opinion, if you do not think it is a wise time to buy, why, that is a fact of life which influences Aetna's purchases in the case?

A. Yes. You can go beyond that, too. I have some idea of what the Finance Committee—how they would react to thinks like this.

[fol. 1988] Q. You try to anticipate what their reaction will be to your recommendations?

A. Well, I do not do things that they are likely to disapprove of. I mean, that is just common sense.

Q. Now, you testified a little earlier that you thought the cyclical factor was a very important factor to take into consideration in studying the long-range price movement of stock?

A. Yes.

Q. You also testified that to the extent that sales were made under this judgment, or large sales for any reason, that it would have a more aggravated effect during the downturn in the cycle; would that be correct?

A. Definitely.

Q. What would your judgment be as to making sales during upturns in the cycle?

A. Do you mean assuming the Government plan is put into effect—is that what you are talking about?

Q. Well, yes, sir, take that or take any—let's just take any sale of a large amount of General Motors stock so that we can talk about it in the abstract.

Mr. Horsky: Well, I object, your Honor. I do not think you can talk about it in the abstract. You have got to have something specific, or the witness cannot answer the question.

Mr. Reycraft: Well, I will make it specific to this extent:

By Mr. Reycraft:

Q. Suppose you are trying to sell, or a trustee, or someone, is trying to sell 2 million shares of General Motors stock and they have discretion to do so over a period of [fol. 1989] time and they are able to sell it during a cyclical upturn; would you have a judgment as to what the effects would be on the market price?

A. The way I look at General Motors from an investment standpoint, that is, investment of Aetna affiliated companies, I did not give that too much consideration. In the first place, I would not expect to see the rise in the price of General Motors reach the levels historically reached in periods of good business.

One of the reasons why is that the market is always looking ahead. That is, it seems to me to be always looking ahead. In a period of extreme optimism, it is possible that General Motors would be rising and I suppose it is possible that the sales could be made without a hitch. I do not know.

I am merely saying that in my judgment it would be best for us to wait, to have patience, which we have the capacity to do, until we entered into a downward phase, and in which case the impact of the two forces meeting would make General Motors' price favorable in relation to other stocks.

Q. You try not to buy on the upturn, I take it?

A. In a cyclical industry we give that some consideration.

Q. Well, you have been patient now for four years with respect to purchasing General Motors stock, is that right?

A. Well, I think I really should elaborate on that. In

the first place, we are not adding very much to our investments, as I mentioned before. We have a stake in General Motors. There has been no urgency to buy General Motors except under conditions where the price was very good compared with other kinds of stocks we are buying.

Q. You have a pretty full portfolio as far as General Motors is concerned?

A. This would be so, but there is no limit—I mean, it [fol. 1990] does not approach a limit in the sense that we would be exposed to unusual risks.

Q. Let me ask you whether in forming your judgment as to the effect that the divestiture might have on the market price of General Motors, you considered supply and demand to be one of the most important factors?

A. Well, these are very unusual conditions of supply and demand, when you talk about it in the normal sense—remember, we are just on one side of the fence, we are buyers and only occasional sellers. We do not know very much about supply and demand.

But here is something that is held out before us. It is extraordinary, most extraordinary. That is what makes the difference as far as we are concerned. I do not know of any other instance where we have known so far in advance that this situation of something like this is going to happen. Never have we known it.

Q. Well, you have not tried to make any study of what would happen, am I correct in that assumption?

A. Oh, no, that isn't a study. No, no, study. As a matter of principle, there is a rights offering forthcoming, if there is any short term change in the supply and demand situation, we will as a general rule, if we are buying, wait for the offering.

We generally always exercise rights because the record shows that as a short term thing it is a better thing to do that and sell later, if that is the aim.

Q. What action did you take during the General Motors rights offering in 1955 with respect to exercising your rights?

A. We exercised them.

Q. And you have held all that stock since?

A. Yes.

[fol. 1991] Q. In your judgment, did the change in the supply in General Motors stock outstanding as a result

of that offering have any influence on the market price?

Mr. Horsky: Have you qualified this man as your expert? I did not ask him those questions. I asked him about his purchasing policy. You are now asking him to be an expert.

Mr. Reycraft: Do I understand then that this witness is only testifying with respect to his own decisions, he is not testifying as market expert?

Mr. Horsky: Well, you can ask him. He is testifying as to what he would buy and——

Mr. Reycraft: And you are only offering him as to that purpose, for what he will recommend to his company?

Mr. Horsky: I have offered him for the purposes stated in the direct examination.

Mr. Reycraft: Which is, I take it——

Mr. Horsky: For what he has testified to.

By Mr. Reycraft:

Q. In reaching your opinion or your conclusion, Mr. Caley, as to what you would recommend to your company with respect to its purchases of General Motors stock at any time—I will go back first to say Mr. Horsky gave you a number of assumptions with respect to dividend policies which the du Pont company might adopt——

A. Yes, sir.

Q. Did you consider that the du Pont Company might within—well, might adopt a policy of paying out all the General Motors stock at one time?

A. Well, that was not a question that was asked of me, no.

[fol. 1992] Q. You never considered that that would be a possibility?

A. I suppose it is a possibility.

Q. Well, whatever opinions you have expressed or whatever testimony you have given has been without regard to that possibility, is that correct?

A. That is right.

Q. Can you tell me what the tax effect is on your company on the receipt of a dividend of common stock from a company which is paying a dividend in the stock of another company?

A. Well, it is at the regular corporate rate with the 85 per cent dividend credit.

Q. And how much is that altogether?

A. That would come to about 7.8. Now, that is the Casualty Company. The Life Company I do not know.

Q. Now, with respect to the Casualty Company, if you receive a dividend of General Motors stock for the market value of approximately $45, what income tax would the Casualty Company pay?

Mr. Horsky: Is there a question about this, Mr. Reycraft? Mr. Caley is not a tax lawyer. I will stipulate that.

Mr. Reycraft: Well, he has testified, I believe, that there are a number of—some nebulous factors as to what would affect his judgment as to what he would recommend to his superiors. I am trying to find out whether he knows enough about this so this is one of them.

The Court: Well, he was not questioned about the taxes.

Mr. Horsky: I did not question him about the taxes.

The Court: I will sustain the objection. It is beyond the scope of the direct.

[fol. 1993] By Mr. Reycraft:

Q. Have you made any decision now, sir, as to what you would recommend to the Finance Committee one year from now or at any time in the future with respect to any distributions of General Motors stock which you may receive on account of your ownership of du Pont stock?

Mr. Horsky: Does that assume the Government plan in effect, Mr. Reycraft? I do not understand the question.

Mr. Reycraft: Yes, it does.

The Witness: Have I made any recommendations to the Finance Committee with respect to stock we would be receiving as dividends if the Government plan were adopted?

Mr. Reycraft: Yes, that is right.

By the Witness:

A. No.

By Mr. Reycraft:

Q. And you have not—Have you reached any conclusion on your own as to what you would recommend?

A. I believe we would hold it in the Casualty Company. I memtioned before, the Life Company is too small.

Q. And you testified that you would not recommend selling du Pont stock either, I believe?

A. No, I wouldn't.

Q. You have testified that you read the du Pont plan, I believe?

A. Yes, sir.

Q. Will you describe that?

A. Well, in principle it is setting aside the General Motors and passing through voting powers—it is from the investors' standpoint, the buyers' standpoint, virtually the [fol. 1994] status quo. We would still be buying du Pont through the du Pont shares and an equity in 1.38 shares of General Motors per share of du Pont.

Q. And do you know anything else about the du Pont plan?

A. You mean with respect to the voting and other provisions?

Q. Yes, sir.

A. No, not to the extent of being able to testify on it.

Q. You do not consider that—well, do you consider that of any importance?

A. No.

Q. Would I be correct in assuming that you will form such judgments and make such recommendations as you make in the future depending on the market conditions which exist at the time you make your recommendations?

Mr. Horsky: May I have that question read?

(Question read by the reporter.)

Mr. Horsky: May we have that question read, please? I am not sure that I understand it.

(Question read.)

Mr. Horsky: I think that is too vague, your Honor.

The Court: Do you understand the question?

By the Witness:

A. It is so general, that I think the answer would be we always take into account what conditions in the market are or are likely to be.

By Mr. Reycraft:

Q. You haven't made up your mind now, have you?

A. As to what conditions are going to be?

Q. As to what your recommendations are going to be.

[fol. 1995] Mr. Horsky: As to what, Mr. Reycraft?

Mr. Reycraft: Recommendations on purchases of General Motors stock, or sales.

Mr. Horsky: Let us take them one at a time. I think it would be only fair to the witness to ask him specifically what recommendation you are talking about.

Mr. Reycraft: As to any recommendations.

By Mr. Reycraft:

Q. As to any recommendations you may make with respect to purchasing General Motors stock. You haven't formed any opinion right now, have you, as to what you will recommend in the future?

A. I have, if you want to specify price in relation to the Dow-Jones Average. I thought I was pretty specific on that.

Q. But you have only formed your opinion with respect to a price range related to the Dow-Jones Average?

A. Oh, yes.

Q. And I would like to ask you again, to be sure that I understand this—in connection with your study of the Government's proposal, you did not take into consideration the tax factors?

A. In such a general way as it was necessary to take into account the tax factors with respect to individuals and their particular situation; the impact or the effect on corporate holders, in a general way, but very general. I didn't make any calculations.

Q. Well, what weight did you give them then?

A. I didn't give them any weight. I mean I didn't allocate to them a certain impact or force. Certainly, they are there; they exist; they will result in some people, some individuals selling.

[fol. 1996] Q. Is your testimony that they will result in some people selling?

A. Now let us go back again.

Are you talking about General Motors?

Q. Yes, sir.

A. You are talking about General Motors?

Q. Yes.

A. It seems to me that there will be some organized selling—unorganized selling of General Motors by holders who need cash to pay taxes and other expenses.

Now in the case of General Motors, though, that kind of thing we are not in a position to measure. There is just one thing, and that is the trustee's sale, and that is specific.

Q. Would you explain that last part of your answer with respect to the trustee's sale? What is your testimony?

A. I say that is specific. We have no way of knowing what amount of unorganized selling of General Motors will occur.

Q. You didn't take into consideration any specific figure, is that correct; or you didn't try to——

A. No.

Q. (Continuing) You didn't try to estimate any specific figure?

A. No, no.

Q. Now with respect to du Pont, did you make any attempt to arrive at a specific figure, either of what the tax would be, or what the selling would be resulting from taxes?

A. No. No.

Q. You did consider, however, the specific fact that the trustee would be selling two million shares a year?

A. Of General Motors.

Q. And did you, in this study which you have testified to, form any judgment as to the effect which this would have on the price of General Motors?

A. Other than the extent of that when it coincided with the declining phase of their earnings, it would have a serious impact and would put the price of General Motors down in relation to other stocks; probably to levels below those [fol. 1997] which we have seen historically. That is all.

Q. Now is this answer limited to the coincidence of such sales with the declining phase of General Motors earnings?

A. I don't think anyone can predict the future. I say that there is a better than even chance that this will happen. What will be the circumstances under other conditions, I am in no position to say.

Q. Can you answer my question whether you limited your earlier answer to the coincidence of the sales with the declining cycle of General Motors earnings?

Mr. Horsky: Would you specify the answer, Mr. Reycraft, for my information?

Mr. Reycraft: I would like to know whether the witness understands——

Mr. Horsky: I think I am entitled to understand it, too, if you don't mind.

The Court: Read the question, please.

(Question read.)

By Mr. Reycraft:

Q. You testified, I believe, that the coincidence of sales with the declining cycle in General Motors earnings would have a "serious" effect.

A. Serious. I meant "serious."

Q. With respect to the effect which you envisioned, is your answer limited to the coincidence of these sales with the declining cycle?

A. My answer isn't limited in this way: that I would expect a disorganized, chaotic market, when you had a coincidence of declining earnings with the sales.

Q. You are talking about a declining, chaotic market.

[fol. 1998] Are you referring now to the trustee's sale?

A. Trustee's sales, primarily, because—not the sales, wait a minute. It is the prospect of the sales that cause the markets to go down.

Q. Do you think a secondary distribution of 2 million shares of General Motors would cause the market to go down?

A. No. I think it is the continuing, the prospect of continuing offerings, known far in advance, which leads me to believe that there would be very few buyers except at absurdly low prices.

Q. Do you think, then, that the fact that there is an additional supply which might come on the market would have this effect?

A. When you can see a supply coming on every year for ten years, you are in an extraordinary position, compared to the position you are usually in.

Well, now, you referred to this Sloan secondary. I had no idea of that coming along.

Q. I didn't refer to it, but I am glad to have you talk about it.

A. I don't know anything about it. But I am pointing out that from our standpoint, those kinds of things we are never aware of; but here is an instance for which I find no parallel.

Q. Does your company own any Ford stock?

A. No.

Q. Are you familiar with the fact that there is a secondary in Ford, which is imminent?

A. Just generally familiar.

Q. Are you familiar with the fact that the Foundation holds a rather substantial amount of Ford stock?

A. Yes.

Q. And are you familiar with the fact that in the Ford prospectus they have said that they are going to sell more of it?

A. I didn't read that.

[fol. 1999] You mean the most recent prospectus?

Q. Yes.

A. I haven't read it.

Q. Each of the two prospectuses.

A. Yes. I remember that from the first prospectus.

Q. Now in making your recommendations to your Finance Committee or to your Board of Directors, with respect to the General Motors purchases, or in refraining from making such recommendations, have you taken into consideration the fact that General Motors purchases a large amount of its own stock on the New York Stock Exchange?

A. No, I haven't taken that into account.

Q. Do you think that that is a fact which may enter into your recommendation or decision?

A. No, I don't.

Q. Would you explain that—why you think that would not enter in?

A. That is not new demand.

All I am saying is that we have an increase in supply, with no demand over and above that which is there or will be there.

Q. So you think that the market is already adjusted for this demand?

A. Well, that would be my conclusion.

Q. You think it is reflected in the price of General Motors now?

A. I am not a market expert. I don't think we consider those things. We are not in a position to consider the nature of supply-demand relationships, because there are so many that are not known. We don't make it a practice to concentrate on those matters, unless they are extraordinary.

Q. You have said that you are not a market expert, I believe?

A. That is true.

Q. When you make a recommendation to the Finance Committee or to your Directors, upon whose studies or opinions do you rely?

A. Well, they are my own.

[fol. 2000] Q. But you make recommendations with respect to purchasing and selling stock?

A. Yes.

Q. And you don't think that requires any expert market judgment?

A. Now are we talking about the same thing?

Q. I am talking about the recommendations which you make to your Finance Committee.

A. No. But I mean, is your idea of a "market expert" the same as mine?

Q. What is yours?

A. Well, a market expert is a person who is in the position to see both the buying and selling sides. He is in a position to have some idea of not just one seller or one buyer, but many buyers and sellers. We merely buy, sometimes sell. We couldn't possibly know——

Q. You rarely sell, is that correct?

A. We don't sell very often. "Rarely," that isn't quite the word; but it is just not very often.

Q. Is Ford stock on your list, Mr. Caley?

A. No, it is not.

Q. Has it ever been on your list?

A. No, sir.

Q. Can you tell me why?

A. Initially, our feeling was that there was nothing in

Ford at its price that we couldn't get in General Motors at its price. That was a relative consideration——

Q. Is that——

Mr. Horsky: Let him finish his answer, Mr. Reycraft, please.

Mr. Reycraft: I would be glad to.

By Mr. Reycraft:

Q. I thought you had finished.

A. (Continuing) That doesn't have anything to do with decisions to buy General Motors, merely on a relative basis.

[fol. 2001] Since then we have thought that the stocks we have in the automobile industry give us adequate representation, and there has been no inclination to look for additional companies in that industry.

Q. What other companies' stocks do you hold in the automobile industry?

A. We hold several. On the list of stocks which we are buying, there is Libbey-Owens-Ford, and of course the rubber companies which are associated with the automobile industry.

Q. There are no other automobile manufacturing companies?

A. We have very small holdings in Chrysler, for instance; and we hold some Thompson Products, Borg-Warner, but not adding to that.

Q. Substantially all of your automobile manufacturing holdings are in General Motors, is that correct?

A. That is correct.

Mr. Reycraft: That will be all.

Mr. Horsky: No further questions.

Mr. Bushby: We have no questions.

The Court: You are excused.

(Witness excused.)

Mr. Horsky: Your Honor, we are going to interrupt, with your permission, the du Pont case and allow General Motors to put on a witness.

The Court: You may.

Mr. Tierney: Mr. Herd will take the stand.

JOHN VICTOR HERD, a witness called on behalf of General Motors Corporation, having been first duly sworn, was examined and testified as follows:

[fol. 2002] Direct Examination.

By Mr. Tierney:

Q. Will you give the reporter your name, please?

A. John Victor Herd.

Q. Where do you live, Mr. Herd?

A. Brooklyn, New York.

Q. What is your business address?

A. 80 Maiden Lane, New York City.

Q. What is your present position and title?

A. I am Chairman of the Boards, and President of the group of companies commonly referred to as the America Fore Insurance Group, and a Director of the other companies affiliated with the America Fore Insurance Group, and commonly referred to as the America Fore Loyalty Group.

Q. How many companies are there in this group?

A. Twelve.

Excuse me, sir, there are twelve insurance companies, and two to three subsidiary inter-corporate service companies of no importance in this particular matter.

Q. What are the names of those companies, if you recall?

A. Of the major companies?

Q. Yes.

A. The two publicly held companies are the Continental Insurance Company of New York, the Fidelity Phoenix Fire Insurance Company of New York—the shares of both of those companies are listed on the New York Stock Exchange. Continental has outstanding and publicly held 6,652,000 shares; Fidelity Phoenix Fire Insurance Company has publicly held and outstanding four million shares. Those two companies, either individually or jointly, own all of the capital stock of the Niagara Fire Insurance Company, the Fidelity and Casualty Company, and practically [fol. 2003] all of the outstanding capital stock of the Firemen's Insurance Company of Newark, the Commercial Insurance Company of New Jersey, The National Ben Franklin Insurance Company of Pennsylvania, The Metropolitan Casualty Company of New York, The Yorkshire

Insurance Company of New York, The Seaboard Fire and Marine Insurance Company of New York, and The Milwaukee Insurance Company of Wisconsin.

Q. Now in those groups of companies—you are on the Board of Directors of all of the companies, is that true?

A. I am a director of all of the companies that I have named so far.

Q. Tell us what business are those companies engaged in.

A. They are engaged primarily in the business of writing property and casualty insurance; and rather than enumerate all of the classes, I should state that it embraces practically all coverages, excepting only life and annuities.

Q. Do you know where your America Fore Loyalty Group ranks among the American property insurers, in terms of premium volume?

A. So far as I know, sir, we are among the top; in the aggregate, our premiums last year totaled, on a consolidated basis, $517,000,000.

Q. What are the total admitted assets of the companies?

A. In round figures, something in excess of a billion and a half dollars.

Q. Have you spent all of your life in Brooklyn, Mr. Head?

A. No, sir. I have been off and on there for 40 years, though.

Q. Where did you come from, originally?

A. Milwaukee, Wisconsin.

Q. When did you first get into the insurance business?

[fol. 2004] A. In 1917, as an examiner for the American Central Insurance Company of St. Louis, Missouri.

Q. Will you tell the Court some of the other positions that you have held in the insurance business over the years?

A. In 1919 I joined up with our present organization, through the Niagara Fire Insurance Company, which at that time was independently operated and owned; and, with the exception of a twelve-month interval between 1930 and 1942, my business life has been spent with the America Fore Group.

Q. When did you become an officer of the America Fore Group?

A. In 1942.

Q. In what capacity?

A. As secretary.

Q. Then what was your next elevation?

A. Two years later I became vice-president. I believe it was in 1949 I became Executive vice-president, in 1954 President; and two years ago, Chairman of the Boards, and President.

Q. So you are presently the chief executive officer of the America Fore Group, Loyalty Group, is that true?

A. The America Fore Group.

Q. Group, yes.

A. Yes, sir.

Q. Now what other affiliations and activities have you?

A. Might I refer to a note I have here on that?

Q. Yes.

A. As to directorates, Mr. Tierney, I am a director of the American Telephone & Telegraph Company, the IBM World Trade Corporation, The Dominick Fund, Inc.; the American Red Cross, New York Chapter, Beekman-Downtown Hospital, New York Heart Association, the Downtown-Lower Manhattan Association, Inc., The Bank for Savings, [fol. 2005] The Brooklyn Institute of Arts & Sciences, The Committee for Economic Development, The Hanover Bank, and The Packer Collegiate Institute.

Q. You have mentioned the Dominick Fund. Has that had a name different from that previously?

A. Up until a few weeks ago it was known as the National Shares Corporation. It is listed on the New York Stock Exchange now as the Dominick Fund, formerly as the National Shares Corporation.

Q. Do your activities with these corporations or any of them involve investment experience, and if so, tell us which ones.

A. You mean, in addition to our own organization?

Q. In addition to your own organization.

A. The Dominick Fund pursuant to the Investment Company Act must, of course, have a certain percentage of outside trustees or directors. I am one of those.

In company with the other trustees or directors of the Dominick Fund, we do deliberate and fix the investment policy of that fund from meeting to meeting.

Q. What are the approximate assets of that fund?

A. $36,000,000.

Q. And you are one of the trustees, you say?

A. Yes.

Q. And as such trustee, what do you have to do with the policies of the investment fund?

A. It parallels the responsibilities and the activities of directors or trustees generally on a fund of that kind.

Q. You pass upon purchases and sales of securities?

A. Correct.

[fol. 2006] Q. Now, you mentioned the Hanover Bank. Will you tell the Court what is the Hanover Bank, and what do you have to do with it?

A. Well, the Hanover Bank is not the largest bank in New York City, but it is one of the outstanding trust organizations, and probably has the largest or one of the largest trust departments in the entire banking community.

I am a member of the trust committee and we meet weekly, 52 weeks of the year, Tuesdays, at twelve o'clock noon.

The purpose of our meetings, of course, is to consider the investments of the various types of trust funds that are under the custodianship and care and management of the Hanover Bank.

Q. Now, the Bank for Savings of the City of New York?

A. I am a trustee of the Bank for Savings. I am not a member of the executive committee, but under their procedures, the trustees are regularly appointed as rotating members of the executive committee, and that assignment comes up in the cards for me about once every two or three months and lasts for a month, with inter-board meetings or inter-trusteeship meetings.

That committee passes on the various investments, real estate, mortgages, bonds, and the type of investments which are legal for savings banks in New York State.

Q. Referring back to the insurance business, what are the activities involved in the conduct of a stock insurance company?

A. Well, of course, in our type of companies, the primary purpose is insuring, property insurance, and the assumption of third-party liabilities, in addition to bonds and suretyship.

[fol. 2007] As I said before, everything except life insurance, which would include also marine and so-called inland marine.

It is the assumption of risk. That is our primary purpose, but collaterally to that and no less important to our fulfillment of our insurance obligations is the question of employment of our funds, and in my position I have a senior responsibility to both operations, the insurance and investment.

Q. Could you explain a bit more fully about the importance of this investment side of your business?

A. Well, the use of our funds, the investment of our funds, is what we rely upon, and we are not alone in that respect. Generally throughout the stock, capital stock property in the casualty insurance business, it is the income that we receive from our investment operations we rely upon to meet our dividend pay-out to our stockholders.

Q. To that end, generally do you look towards—to that end, does liquidity have some importance in your investment policy?

A. Well, that is one of the essential indispensable factors, in addition to which, if I may volunteer, we look of course for stability. We look for preservation of principal. We look for marketability, which is also liquidity. We also hope and look for a continuation of investment income.

One additional factor which has been primary in our investment policy for over 50 years has been the growth factor.

Q. Now, then, as a property insurance company, are you restricted by the same rules and regulations that a life insurance company is?

A. No, sir.

[fol. 2008] With respect to investment?

A. In equities, no sir.

Q. What, if any, limitations are on your property insurance?

A. Under the New York law, Section 87, I believe, we are required to keep certain of our reserves or an amount equal to our reserves and our capital in fixed obligations, such as Treasurys, and equivalent. But once we have satisfied those limited requirements, we have a latitude that permits us to invest in the equity field; the principal limitation there being that we do not put our funds in any shares of any corporation or operation for more than 10 per cent of our invested assets.

Q. What is the value of the America Fore Loyalty Group investments in marketable securities as against that?

A. In round figures, Mr. Tierney, they are somewhat higher than this now, but the latest figures I have are $1,300,000,000.

Q. How are those divided as between bonds and preferred stocks and common stocks?

A. Again, approximately one-third of that amount is in fixed obligations, bonds, and preferreds. The other two-thirds is in equities.

Q. Do you recall what the market value of your investment in common stocks approximates?

A. The latest figure I saw, which is relatively recent, was $820 million in our organization.

Q. What per cent of your total dollar assets are invested in common stocks?

A. Again, approximately 53 per cent.

Q. Have you an opinion as to where the America Fore Loyalty Group ranks in holdings of common stocks among [fol. 2009] insurance companies?

A. So far as I know, and I think that my observation is reliable on this, we have by far the largest aggregation of equity shares under one management or in a portfolio of an insurance company, any insurance company.

Q. Approximately double the next in rank, is that right?

A. We approach it, if we are not there.

Might I add in that connection, Mr. Tierney, that we started investing in equities over a hundred years ago.

Q. Is that so? What was that?

A. Our first investment in equity shares was made in our organization in 1858 and comprised local bank stocks. When I say local, I am referring to New York City.

Q. Do you recall whether you moved into railroad stocks at an early period?

A. Yes, we were indulging in what was heresy back in those days for an insurance company, to be putting any of their funds in so-called common stocks or equities. I think again that we probably have had the outstanding record in the insurance field in the equity field.

Q. Do you recall when you first acquired industrial stocks?

A. That was back in the last century. As I recall it, we

had some—my memory is not clear on that—we had telephone stock shortly after the turn of the century.

Q. And U. S. Steel, how long have you had that?

A. Well over fifty years.

Q. Is it safe, or rather, accurate to say that you are probably one of the first insurance companies to make investments in common stocks?

A. That is a safe statement.

Q. Have you some knowledge as to the holdings in [fol. 2010] common stocks by your companies according to rank, the fifteen largest holdings?

A. I might be able to call them off from memory.

Mr. Tierney: I have an exhibit here. I will ask the reporter to mark this as General Motors Exhibit No. 11 for identification.

(Thereupon said document was marked General Motors Exhibit No. 11, for identification.)

By Mr. Tierney:

Q. Will you please look at the document which the reporter has marked General Motors Exhibit 11 for identification, and tell me whether or not that was prepared under your supervision and direction?

A. Well, whether it was prepared under my direction or not, we keep this figure before us all the time.

Q. This is taken from your report?

A. Yes. It is a summary of the cross section consolidated of these fifteen holdings.

Q. And are they accurate figures?

A. So far as I know.

Mr. Tierney: Does the Court have a copy of this?

The Court: Yes, I have a copy.

By Mr. Tierney:

Q. I call your attention to the column on the left. That ranks the companies in which you have investments in the order of the dollar market value, is that right?

A. As of December 31, 1958, yes.

Q. And the column under "Shares," indicates the number [fol. 2011] of shares of the respective stocks which are held in your portfolio, is that correct?

A. As of December 31, 1958.

Q. Now, I call your attention to the General Motors Corporation. That is Item 15. How many shares of General Motors do you have in your portfolio?

A. 249,500.

Q. And as of December 31, 1958, what was the market value of those shares?

A. $12,350,250.

Q. I call your attention to Item No. 4 on the list, referring to du Pont. How many shares of du Pont did you have as of December 31, 1958?

A. 123,300.

Q. And what was the market value of those shares as of that date?

A. $26,355,375.00.

Q. If you were to receive under the Government plan a distribution of General Motors stock held by du Pont, your holdings in General Motors would be increased——

A. About 170,000 shares, using the 1.38 per share of General Motors per share of du Pont as the basis.

Mr. Tierney: I offer in evidence General Motors Exhibit No. 11.

Mr. Keycraft: No objection.

The Court: It may be received.

(Said document, so offered and received in evidence, was marked General Motors Exhibit 11.)

By Mr. Tierney:

Q. In the conduct of your companies' business, do you have an Investment Department?

A. Yes.

Q. If you do, tell us about that.

A. Well, shortly following the end of World War I, with our equity holdings and other holdings assuming the pro- [fol. 2012] portions that they were then assuming, we ceased relying solely on outside help and began to do the analysis work and the projection and the inventory work of our investment portfolio through our own Investment Department.

That department has increased in importance to us until now we rely almost entirely on our own interviews and

our own analyses independently of the prevailing opinion on the outside.

Q. Could you just in a general way tell us something of the composition of that department?

The Court: The Court will recess at this point.

(Thereupon a recess was taken in the above-entitled cause until 2:00 o'clock p.m. of the same day, Monday, March 23, 1959.)

[fol. 2013] Before Hon. Walter J. LaBuy, Monday, March 23, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to adjournment.

Present: Same as before.

The Clerk: Case on trial.

The Court: Proceed, please.

JOHN VICTOR HERD, called as a witness on behalf of General Motors Corporation, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination.—(Continued)

By Mr. Tierney:

Q. Before adjournment, Mr. Herd, we were discussing the establishment of the Investment Department and its make-up of analysts and specialists with respect to various companies. What is the source of the information that your staff operates on?

A. Well, the officer immediately in charge of our Investment Department is a Vice-President of thirty-odd years' association with us, and associated with him is a Vice-President who spells him at times during his absences and things; but next in line are several analysts who specialize—some are officers and some are not—by industries.

I am not aware of an equity holding that we have in our [fol. 2014] portfolio where one of those gentlemen is not able to get in touch with the senior executive officer of the company whose shares we hold to get information that we are properly entitled to as stockholders or to make an

appointment to interview him and his associate officers. So we rely more on direct interviews with the men who are running these companies than we do any other factor for the appraisal and the evaluation of the worthiness of these shares that we put our money into.

Q. Mr. Herd, are you comfortable there?

A. I am all right.

Q. I notice that you are leaning forward.

A. No, I am all right.

Q. Now, Mr. Herd, how are decisions made as to the general investment policy or as to the purchases and sales of specific securities?

A. Well, first of all, there is nothing that we hold that we do not make up at least once a year an inventory report on, whether there has been any public development in connection with it or not, just to make sure that there have been no changes of which we were not aware.

Very often we will put together a report on a particular holding oftener than once a year. These reports come to me in semi-final form after they have been edited and digested by the Vice-President in charge of the investment operations. Our analysts are under instruction to put down their own conclusions. We do not want to prejudge as a management policy matter what they develop and feel as a result of their own personal visits, but in doing that, of course, management always reserves the right to act or not act according to the recommendations that appear in these reports.

[fol. 2015] When reports are sent out to the members of our Executive Committee—and our Executive Committee in our company is also the Finance Committee—they have reasonable time, approximately a week, to study them, to read them, and our meetings are held every Thursday, fifty-two Thursdays of the year, in addition to our monthly Board meetings, at which all the Directors are in attendance.

The routine study and deliberations, considerations of our holdings, all holdings, occur largely in the Executive Committee meetings.

I am a member of all Executive Committees ex officio. We have an outside Director-Chairman as a rule and in his absence I act as Chairman.

I have a vote. While the law does not impose this upon

us, as it did in the case of the gentleman who preceded me here, we have for many, many years followed the custom that one negative vote was enough to prompt no action affirmative or negatively.

Q. The ultimate decision as to whether you buy or sell investments, or whatever the general policy may be, is in the Executive Committee?

A. Completely; and the Executive Committee actions, of course, are ratified from month to month at the Directors' meetings; but between meetings of the Boards, the Executive and Finance Committee has the complete power of the Board.

Q. Now, does your group have any general policies with respect to investments?

A. Well, in general, of course, we address ourselves to the factors that I have already mentioned to you, and that is the question of stability, the preservation of capital, the liquidity, marketability, investment income; but, in addition to all of that, we keep our eye trained on the question of diversification at all times, and we watch the diversification [fol. 2016] within industries, as well as the diversification of our holdings among industries.

Q. Would you consider yourself a long-term investor?

A. We are, I might say, very poor sellers. Once we take a position in an industry or in a company, the die is cast; and unless there is a development, very unusual circumstances and unforeseen circumstances surrounding an industry or a share within that industry, we usually stay with it.

Q. Now, in your effort to remain liquid, do you have any policy towards what are known as Blue Chip stocks?

A. As I think is evidenced, Mr. Tierney, by Exhibit 11 that you have put in on behalf of General Motors, our portfolio is about as pure a Blue Chip portfolio as I think you could find anywhere.

Q. What is the purpose of that?

A. Well, getting to the question of liquidity, I mentioned earlier that our primary business is one of insurance, the assumption of risk; and we never know, and history has taught us that acts of nature, acts of God, untoward events of one kind or another, catastrophes, can cause us to have to raise money to meet our policy obligations and respond to policy claims on very short notice.

And, as an example, we watch our liabilities and try to diversify our risks on the insurance end, the same as we do in the investment of our funds. But if by some act of God, an earthquake or otherwise, the bridges and tunnels in and around New York City, which are privately insured on behalf of the Port of New York Authority, the Tri-Borough Bridge Authority, should become constructive total losses, my own companies would be called upon to pay 32 million dollars net.

[fol. 2017] A case of two ships, airships coming together, such as they did over the Grand Canyon a few years ago, on today's values of these new air hulls, my own companies could be in for a loss of a million, seven hundred fifty thousand dollars per hull, in flight; and when the ships come together afloat, we have a net line in our organization of two million dollars in the liner United States; we have a net line on the Queen Mary, a million dollars; a net line on the Queen Elizabeth, a million dollars; and some of these other new vessels are taxing the underwriting capacity of the insurance market; and any of those could cause a catastrophe which could prompt the liquidation of securities in order to respond to our policy liabilities.

So we keep one eye cocked on that at all times.

Q. And that is geared to your investment policy, and that is why you have to watch it so carefully?

A. We can't ignore it. I mean, it is inseparable.

Q. Now you have testified here, and as is shown by General Motors Exhibit 11, that you have substantial holdings in those du Pont and General Motors.

What are the characteristics of those stocks which have appealed to you in General Motors and du Pont, as an investor?

A. Well, they both of them, inherently, have the characteristics that I mentioned that we look for. I think it is generally recognized that General Motors, in its field, ranks number one. There is an element of inherent diversification that resides even in a share of General Motors; but in a share of du Pont, you not only have the chemical industry and the diversification that they have gotten into through chemistry and research, but the indirect holding of General Motors in a share of du Pont has been a matter that investors, such as our companies and others, have been conscious of for many, many years.

[fol. 2018] Q. That is du Pon't indirect holding——

A. And our indirect holding of General Motors via each du Pont share.

Q. When did you first acquire du Pont stock?

A. Du Pont came into our portfolio for the first time in 1930, I believe.

Q. And General Motors?

A. For the first time in 1932.

Mr. Tierney: Just to repeat, your Honor, according to General Motors Exhibit 11, you had 123,000 shares of du Pont at market value on December 31, 1958, of $26,355,000, and 249,500 shares of General Motors at a value of at that same time of $12,250,000.

Q. Mr. Herd, are you familiar with the Government's proposed plan involved in this case?

A. In a general way.

Q. You have read it?

A. I have read a synopsis and it——

Q. Well, do you understand from it that, (1), there will be annual sales over a ten-year period of approximately 2 million shares of General Motors stock?

A. Per annum. That is my understanding, yes.

Q. An annual distribution to du Pont stockholders of approximately 4,300,000 shares?

A. That is as I understood it.

Q. You understand also that the Internal Revenue Bureau has ruled that the annual distribution of General Motors stock would be taxable to du Pont shareholders as ordinary dividends, and that it has been estimated that an additional million shares or more of General Motors are likely to be sold each year by the distributees to pay taxes?

A. I have been so informed.

[fol. 2019] Q. Now, based on these assumptions and assuming the Government plan would be put into effect, would you expect it to have an impact on the market price of General Motors stock?

A. Mr. Tierney, may I relate that to our own situation? I can discuss that, I think, with some reliability.

If this should happen, and as I said this morning we would receive 170,000 additional shares of General Motors by virtue of our du Pont holdings, which would bring our General Motors holdings from 249,000 to 420,000, we im-

mediately are confronted with our question of diversification by industry and by one company within that industry.

We couldn't ignore, of course, the inherited tax base at which the 170,000 shares would get into our portfolio. Relate that to the average tax cost of what we already have, and weigh the exposures there.

While I cannot speak with authority for what our Finance and Executive Committee might decide to do, I think I can say with reasonable assurance that there would be some of our shares finding their way rather promptly onto the market.

If other people who are in a position similar to ours or for reasons that were mentioned this morning by Mr. Caley should create an artificial or abnormal surplus of available stock, why, it could have, in my opinion, only one result, and that would be a depressing of what would otherwise be a normal market value of those shares.

Q. In other words, the market value of General Motors stock would be depressed?

A. In my opinion.

Q. Can you estimate how much the market value of the [fol. 2020] General Motors stock would be affected?

A. I will have to be perfectly honest and say that I haven't the slightest idea because it would depend on so many related factors, many of which might not even be foreseen as we sit here today.

The investment of money in equity shares, of course has been recognized as carrying with it a calculated risk under the best of conditions, and I think that a great many institutional investors, at least I can speak for ourselves, that when we employ our money in the shares of an organization that does not have a cloud over its market conditions, I think we would move in that direction and await the outcome and see what the extent and the length and the effect of the cloud was before we employed any new money or even retained our investment in that direction.

Q. You speak of a cloud. What cloud do you have in mind?

A. I have in mind what has been referred to as the overhang, that is, the prospective distribution—are you still addressing me in connection with the——?

Q. Market impact.

A. Market impact of two million shares on an average

per year from one source and 4,300,000 under the other?

Q. That is right.

A. That is the cloud I was referring to.

Q. And how do you think this impact would be felt or display itself?

A. Well, that too would depend upon the conditions that obtained and applied, say, beginning with the formal announcement that such a program, the decree had been finally effected, or whatever form it takes.

Then from that time on there would be in the picture, in my opinion, deterrent considerations that, again, I don't think we can foresee here. They would be aggravated, [fol. 2021] though, by the thing you referred to, I am quite sure of that.

Q. Is it your view that the investor attitude towards this overall impact of the Government plan would have a greater market effect than the actual sales themselves?

A. I think that the investor psychology, the so-called luster value of the so-called blue chip shares are held there in that appraisal, in that category, very much by psychology as well as arithmetic, and I could go into details, if you wish, but——

Q. Explain, if you will.

A. Well, the top of our list there is IBM. IBM today is yielding in cash dividends less than one-half of one per cent. It has moved from the 38th place to the first place in the portfolios of investment trusts generally in the ten-year period.

By any of the orthodox yardsticks which you would normally apply through the customary channels, it would be very difficult to justify the current market quotation on IBM shares. Yet, I must confess that in the past year or two, we thought it was too high and sold it, sold substantial blocks of it, and currently it has turned out to be quite a mistake.

Q. You attribute the investor's psychology here as an important factor in the appraisal of this plan, is that right?

A. I think it is as important as any other, or at least as important as any other single factor that enters into the appraisal of those shares.

Q. Do you have an opinion as to whether the investor's attitude, particularly an institutional investor such as yourself, toward the Government plan would be helped if the

sales were administered by a group of financial experts?

A. In my humble opinion, Mr. Tierney, that wouldn't make a bit of difference.

[fol. 2022] Q. Why?

A. Because the uncertainty that would be implanted in the mind of the small as well as the large investor as to the timing of the release of these shares on the market would seem to me to delusterize, to some extent, if not to a serious extent, the desirability of these shares.

Q. If the Government plan were put into effect, would your company on your recommendation be a purchaser of General Motors shares?

A. Well, I think we are probably poor ones to ask that question of, because I have already stated that the Government plan would take the diversification that we consider presently in here [illegible] in du Pont with its ownership of General Motors, and put it strictly into the motor classification, and we would have to evaluate or reappraise our position as to the holdings in General Motors as to whether we want to have that particular company's stock move up from 12 million dollars in our portfolio to $20 million.

Q. Would you become interested in General Motors under any circumstances?

A. Well, I think perhaps I can echo what Mr. Caley said this morning. It would be imprudent; I think it would be unwise for me to tell you that we would not be interested in General Motors stock under any circumstances.

I can foresee where an artificially low market evaluation could result from pressure on sale of that stock, which in our opinion would take it down in relation to the average market prices of comparable shares to where we couldn't very well afford not to avail ourselves of bargain prices.

Q. So that if, and only if it got to be at a bargain price, would you be interested in acquiring General Motors?

A. You asked whether we would be interested in any circumstances in General Motors shares. I cited one.

[fol. 2023] Q. Well, now, this Government plan which has been proposed, has it had any effect upon your views as to whether or not you would be interested in acquiring shares?

A. I can say I think with certainty that so long as this present—again, I use the word cloud.

Q. By that you mean the Government plan?

A. The uncertainty of what might come out of this situa-

tion would deter us from putting any more money under present circumstances into General Motors stock, quite aside from the other surrounding considerations, such as their position in the industry, the trend in the industry, and so forth.

Q. Would you expect other institutional investors to have the same view as you do?

A. Well, of course, I can't speak for them, but I think it is reasonable.

Q. I take it, if your views are accurate, that you would not consider the institutional holders as constituting a market to support the Government's plan?

A. Well, I do not know whether the conditions have changed any, Mr. Tierney, but when the Fullbright Report was published, it is my recollection that less than 2 per cent of the outstanding shares of General Motors were held by our type of institutional investor.

Q. Well, how about the small investor, do you think the plan would have any unfavorable results for the small investor?

A. Well, there I think we get into the question of the mass, the psychological aspect of it. I think normally as a class they probably are not as well informed or completely informed and are more likely to act upon impulse. We have seen evidences of mass psychology at work in the market both ways.

Q. Now, as a stockholder in du Pont, the America Fore [fol. 2024] Loyalty Group, as you have testified, would under the Government plan receive approximately 1.38 shares of General Motors for each share of du Pont or approximately 170,000 shares of General Motors.

Would you retain these?

A. Well, I think I probably have touched on that before. At our present holdings of 249,500 shares of General Motors, as such, and if we were to get an additional 170,000 shares of General Motors from our du Pont stock, which would move our direct investment in General Motors up from 12 million plus to 20 million plus, we would have to take a careful look again at the question of the lumpiness of our holding in one company and its relationship to our diversification policy.

So the question of whether we would retain 170,000 on top of the 250,000 roughly is one that would have to be

determined in the light of the conditions that apply at that time.

Q. Well, have you done that? Have you disposed of other stocks where you have the lumpiness or the long-term outlook?

A. Well, the reference I made a few minutes ago to IBM was a result of that holding reaching a point where we felt it was out of proportion as a single company investment to our total portfolio. So we lightened our load.

We might have, even though we knew what was going to happen to that stock since.

Q. Now, do you have an opinion as to whether other institutional investors will have the same concern?

A. Well, I think, Mr. Tierney—and I have been informed, that most of the institutional investors do have a chart or a target, an objective that they adhere to generally as to diversification.

[fol. 2025]. Should they find themselves in the same position that I have just outlined as to ourselves, why, it is reasonable to assume they would have to view it in that light.

Q. Now, in your previous answers you referred to acquiring General Motors if it got to be at a bargain price. What would you consider to be a bargain price?

A. Well, that would depend on the general market conditions at the time that this thing happened or at the times it happened if it was spread out over several years, because today, for instance, there are a great many blue chips that are yielding a dividend income as low as one and a half per cent, and I suppose the average is closer to three per cent.

In most cases it is less than the available yield today for Government bonds. It is not very many years ago, just a few years ago, that equities were yielding more than twice that on an average. I think the bargain would have to be related to conditions prevailing at the time for these shares we are looking at.

Q. Percentage wise what would you say the yield would be?

A. Well, when a blue chip, any blue chip, particularly General Motors gets into an area where it is yielding a dividend that is considered safe as to the foreseeable

future, six, seven or eight per cent, why, we would probably look at it hard and with some longing.

Q. And if the Government plan went into effect and General Motors got to that yield, you would look at it?

A. Well, there would be other considerations, that is, the diversification and the long pull situation.

Mr. Tierney: I think that is all.

[fol. 2026] Cross-examination.

By Mr. Owens:

Q. Mr. Herd, when did you first commence your study of the Government's proposed plan, sir?

A. Well, I have not studied the Government's proposal. I have read the synopsis and refreshed myself on that within the past two days, but I have never studied it as such.

Q. Well, could you tell us what the extent of your study was of the market effects of the Government's proposed judgment?

A. I am not here as an expert on the market. If you mean the possible action that our own companies might take, I have tried to cover that in my responses to Mr. Tierney; but, as a market analyst or expert, I think I would have to disqualify myself.

Q. Well, you have testified, as I understand it, with respect to your opinion of what the market effects are going to be?

A. That is correct.

Q. Is that not correct?

A. That is correct.

Q. Now in formulating your opinion or your judgment as to what those market effects would be, would you tell me whether or not you yourself made any studies of marketing of securities?

A. I did not.

Q. You made no particular study in this connection, is that right?

A. No, I did not.

Q. Did you cause to have members of the Investment Staff of the companies with which you are associated make such studies?

A. No, sir.

Q. Did you cause studies to be made with respect to the different methods by which the stock might be marketed?

A. No, sir.

Q. And could you tell us whether or not your opinion is influenced in any way by the manner in which the marketing would take place?

A. May I elaborate a little on my answer on that one? [fol. 2027] If you are referring to the divestiture of 63 million shares by the two methods——

Q. That is correct.

A. (Continuing) My observations and opinions were addressed to any situation where there would become available, we will say by decree or order, for distribution to the general public a block of shares representing the percentage of the total that General Motors does in this case.

And I was talking to the principal and to the probable effect, and not to this specific there, although I am here on that particular problem.

Q. Well, did you obtain any opinions of investment bankers with respect to this issue, sir?

A. None.

Q. So that your opinion is not based in any degree upon estimates from financial experts, as to the difficulty that would be encountered?

A. None.

Q. Then I take it that your testimony in no way is predicated on any difference in the marketing effects, depending upon the manner in which the stock is sold?

A. My testimony is in my capacity as a steward or trusteeship, trustee of the funds that the companies that I represent might or might not have for investment, and is largely based upon that relationship.

Q. As I understood your testimony, the principal factor that you concluded would lead to a depressing effect upon the price of the General Motors stock was this increased volume of securities on the market?

A. That was my opinion.

Q. That is your opinion?

A. It has stemmed from my relationship to our own attitude toward the situation, which result could and [fol. 2028] probably would arise in the event this went through.

Q. Are you an expert market analyst, sir?

A. I am not.

Q. Do you recognize that the studies and judgments of market analysts are a relevant factor in reaching a conclusion on a subject such as this?

A. In our considerations?

Q. In any intelligent person's estimate of consequences of market.

A. I tried to make it clear, Mr. Owens, that so far as our own decisions are concerned, in the employment of our funds, we rely solely upon our own analysis; and I can't recall in many, many years where we had been influenced to buy or sell by outsiders.

Q. Have you made any studies of what the relationship is between volume and its effect on price?

A. I have not.

Q. Do you recognize that if such studies revealed that there was a small or slight association between volume and price,—do you recognize that that would change your opinion?

A. Let me see if I understand your question: That if there should suddenly become available on the market a large supply of stock from a source such as this, as to whether it would have any bearing on the market quotations for that stock than would have otherwise existed?

Q. I am not sure that I understand your answer.

A. I was trying to interpret your question.

Q. Well, let me try it this way, Mr. Herd.

Suppose there is evidence to indicate that the degree of association or relationship between the volume of a [fol. 2029] commodity and its market price, is small, would that change your opinion?

A. Well, I have a little difficulty, Mr. Owens, relating that to the purpose for my being here.

Q. I understand why General Motors called you, Mr. Herd, and I understand the opinions that you have expressed; and I am now trying to explore whether or not those opinions would be affected by evidence that there is a small or a slight association between the volume of General Motors stock and the changes in its price?

A. Let me say, Mr. Owens, that any creditable expert evidence that was available to us would certainly be given

due consideration before we reached a decision; but it wouldn't be controlling.

Q. In connection with your testimony here, have you had occasion to examine the Government exhibits that were prepared by the management consulting firm of Boni and Watkins?

A. I am very sorry, I did not have an opportunity to analyze or study those, or the other testimony which preceded me here.

Q. In view of the emphasis that you place upon the relationship of volume to the depressant effect, does it not appear to you that that would be a very significant body of evidence that was highly relevant in reaching a conclusion on this issue?

Mr. Tierney: Just a moment. I object to the form of that question. It assumes something which has not been testified to.

Will the reporter please read it back?

I don't think you will like it yourself.

I object to it.

The Court: Read the question, please.

(Question read.)

[fol. 2030] Mr. Tierney: It is obvious that this witness has not placed any weight on volume. It is a mis-statement of the record.

Mr. Cox: I would like to point out, your Honor, in support of what Mr. Tierney has said, that I find Mr. Owens' questions confusing, because he speaks of volume, without telling us whether he means volume of supply or volume of demand.

By Mr. Owens:

Q. I am speaking of volume of supply of General Motors stocks, sir?

A. Well, I don't want to indulge in semantics, but the quantity of stock made available, if it were in excess of the demand, of course it would have a depressing effect; at least it always has had. But as to volume, as has been pointed out, there could be a very high volume when the shares are moving upwards.

Q. Do you recognize that it is important to consider

how much change in price a given change in volume will create?

A. I think in this you are indulging in speculation on so many imponderables and factors that are going to have to be brought and will be brought to bear on market prices that it is almost impossible to estimate the effect.

Q. Well, suppose you were to assume, Mr. Herd, a change of an eighth in the price of General Motors were to triple the demand for General Motors. Would that be a factor in reaching a judgment on this issue of relationship of volume to depressing effect on price?

A. Well, I wouldn't even get very far on that assumption. I would have difficulty going along on the assumption that a change of an eighth in the price of any stock would triple it or reduce or increase the demand.

[fol. 2031] Q. Well, just assume that, if you will; then tell me whether or not it would be a factor in affecting your judgment.

A. May I have the question read back to me, the one about an increase of an eighth in the price?

Mr. Owens: Will the reporter please read that question?

(Question read as follows:

"Q. Well, suppose you were to assume, Mr. Herd, a change of an eighth in the price of General Motors were to triple the demand for General Motors. Would that be a factor in reaching a judgment on this issue of relationship of volume to depressing effect on price?")

By the Witness:

A. You are assuming an eighth drop in the price would treble the demand for it?

Well, of course, if you want to go along with that assumption, it is bound to have a bearing on it.

By Mr. Owens:

Q. Do you understand the phrase "cross-elasticity of demand," sir?

A. I didn't follow you on the question.

Q. Do you understand the expression "cross-elasticity of demand"?

A. I do not.

Q. For the purpose of exploration of some of the bases for your opinion, will you assume that cross-elasticity of demand relates to a percentage change in demand that will be created by a certain percentage change in price?

A. What is the word that you used immediately preceding "elasticity"?

Q. "Cross-elasticity of demand."

A. Is that a nomer; that is, has someone labeled it that?

[fol. 2032] Q. It is a recognized term in economics, Mr. Herd.

Are you acquainted with that fact?

A. It is the first time I have heard the use of the term.

Q. Well, do you understand that there is a relationship between the quantity of oleomargarine that will be sold, depending upon the relationship of the price of oleo to the price of butter?

A. I think that is reasonable to assume; but is that——

Q. Well, you recognize, do you not, that if the cost of butter is higher in relation to oleo—that more oleo would tend to be used?

A. I will take your word for it.

Q. Do you have any difficulty recognizing that?

A. I have never studied it.

Q. Well, does it appeal to your common sense?

A. It seems to me to make sense.

Q. Now with respect to the investment opportunities that are open to people with money to invest, do you recognize that there is an area of effective competition between various types of investments?

A. I am quite aware of that.

Q. Do you recognize that there is an area of effective competition between investments, say, in mortgages, as against investments in bonds?

A. That depends of course, Mr. Owens, on the kind of a market you are in at the time the money is available for investment.

Q. And one of the things that influence that is the comparative yield of the various investment alternatives open to a person with funds, it that right?

A. The first thing of course would be the availability of

investable funds, to start with, because there can be competition in reverse for funds.

[fol. 2033] Q. Do you recognize that there is an area of effective competition for investment of funds as between stocks and bonds?

A. I understand that.

Q. You recognize that, do you not?

A. I recognize it.

Q. And you recognize that there is a similar situation of area of effective competition with respect to—rather among various types of common stock?

A. That depends again upon the market you are in at the time. Sometimes the competition will be to sell faster than the other fellow.

Q. I didn't hear your answer, sir.

A. I say it depends upon the market you are in at the time, Mr. Owens. At times there is considerable competition to get rid of your stock at as high a price as possible before the other fellow does.

Q. Well, that is competition between getting into something other than stocks with the same funds, is that not right?

A. It is competition of getting rid of what you have.

Q. That is, to invest in something else, is that right?

A. Not necessarily. Not necessarily. Competition works both ways, depending upon the climate, investment climate and the general economic climate at the time the desire arises to buy or sell.

Q. Well, the thing that the investor is interested in is return on his investment, isn't that correct?

A. It is not necessarily limited to that. I think I have testified as to our own position that safety of capital is a primary consideration.

Q. So that one of the things that he is interested in is return on the investment, is that correct?

A. That is one of the things.

[fol. 2034] Q. And another is the safety of capital?

A. That is the most important.

Q. That is the most important?

A. That is correct.

Q. You recognize those are two types of utility that investments have.

A. By utility, I get confused because the word is employed so often in connection with public utilities.

Q. Let me use the word usefulness.

A. Or employment, yes, yes.

Q. And it is relative utility or usefulness for those characteristics, that is, safety of capital and return on investment, that the person with funds takes into account in deciding where to employ his capital, is that correct?

A. It sounds axiomatic to me.

Q. Now, do you recognize, sir, that there is a degree of competition in common stocks between utilities and railroads and industrials?

A. A degree of competition among common stocks?

Q. That is right, competition for the investor's dollar.

A. I wasn't aware of that, Mr. Owens.

Q. As the picture changes from time to time, depending upon the yield of industrials as against utilities or industrials as against rails, don't those factors and the relative safety of investment vary the degree of the attractiveness to the investor from time to time?

A. Well, you can have a lackluster stock, a drug on the market and looking for a home, at the same time that a luster stock is in great demand and scarce. I wouldn't go along that the lackluster stock, the fellow who has got his money in that, is in competition, or that the fellow who has money to invest is going to be competing for the lackluster stock as an investor where he would be competing for the luster stock.

[fol. 2035] Q. Do you recognize that there is an area of effective competition between various types of industrial stocks?

A. Depending upon their character and desirability and availability.

Q. What elements do you consider as affecting the desirability of industrial stocks, one as against the other?

A. Preservation of capital, the preservation of the investment income, which means the continuity of earnings, the marketability, the liquidity.

Q. The growth factor?

A. Growth is very important.

Q. Earnings?

A. I have mentioned that.

Q. I think we understand each other now with respect to the concept of cross-elasticity of demand.

I want to ask you if you have an opinion, sir, with respect to the degree of cross-elasticity of demand as between speculative stocks, for instance, and blue chip industrial stocks.

A. Mr. Owens, if you can rephrase, or give me a term that I am more familiar with, or if you can define this elasticity of demand so that I could address it to my concept or understanding of what it might mean, it would help me.

If it is a magic term or a term of economics that has escaped me, you would be very helpful to me if you will put it in some language that I can understand.

Q. Well, let me try to illustrate it with respect to the example I gave before of the relationship between price of oleo and the price of butter, and the amount that would be sold.

You understand that there is a relationship between [fol. 2036] those two?

A. I said I was willing to take your word for it.

Q. And you also testified, I believe, that it appealed to your common sense?

A. It seems to make sense, yes.

Q. That is what I am asking you to keep in mind as the relationship of this term cross-elasticity.

A. Let's proceed from there and I will see if I can respond.

Q. Well, let me define it in general terms, if my illustration doesn't make it clear. I am trying to explore the question of the extent to which changes in volume will produce changes in price.

Now, with respect to some commodities, it becomes recognized that large changes in volume will only produce small changes in price——

Mr. Tierney: If the Court please, I suggest counsel explain to the witness what he means by volume.

Mr. Cox: Supply and demand.

Mr. Tierney: Supply and demand.

Mr. Cox: Or both.

By Mr. Owens:

Q. Both supply and demand. The volume of supply for some products will produce small changes in the price and with respect to other commodities, large changes in volume of supply will produce large changes in price.

Mr. Tierney: Let's hear the question. Will the reporter read it back?

Mr. Owens: Mr. Tierney, the witness said he did not understand the term that I used, and I am trying to explain to him so that he will be able to answer the question.

Mr. Tierney: Do you know what the question is now?

[fol. 2037] Mr. Owens: I haven't asked the question yet.

Mr. Tierney: All right.

By Mr. Owens:

Q. Have I made myself clear to you, Mr. Herd?

A. If you haven't asked the question, I am still waiting.

Q. With respect to the concept I am discussing.

A. No, I must confess that I am still at sea as to the relationship between the oleo, butter, du Pont and General Motors.

The Court: Mr. Owens, I am going to suggest that perhaps a better example is to make a comparison between the relative prices of jelly and marmalade, instead of oleo and butter. Maybe we could move on faster.

By Mr. Owens:

Q. Do you have an opinion, Mr. Herd, with respect to whether or not there would be larger changes in price of a speculative stock where supply is increased than with respect to changes in the price of blue chip industrial stock where the supply is increased?

A. Mr. Owens, I feel that all of the experts who have spent their lives studying that subject, or their business lives, have been confounded by what has happened in the past two or three years, and quite contrary to tradition and historical pattern, the so-called blue chips in many instances, such as IBM have out-distanced the more highly speculative issues, which has caught quite a few of them unawares.

I don't know whether that answers your question or not.

Mr. Owens: I don't think it does. I would like to have the reporter read the question.

(Question read.)

[fol. 2038] By the Witness:

A. I think I have answered your question, sir.

By Mr. Owens:

Q. Do I understand you to say that you don't have an opinion? My question was, do you have an opinion in that regard?

A. I tried to express it. If you like, I will put it in some other words.

Q. Well, I do not comprehend your answer in relation to the question I asked. I understood what you said, but I have difficulty in relating it to what I said.

The Witness: Will you read back my answer, please?

(Record read.)

A. Well, I will put it in other words. I do not know of anyone who can answer your question reliably.

By Mr. Owens:

Q. So that you do not have an opinion as to whether or not——

A. The opinion I have is that the uncertainty is such that you cannot pin it down.

Q. You can not——

A. I would not attempt to prognosticate whether blue chips were going to outdistance speculative issues, or vice versa.

Q. Well, that is not my question. I think perhaps that is the source of our difficulty, that maybe I have failed to get the question across to you clearly, sir.

A. Yes.

Q. Let me try it again. I want to know whether you have an opinion as to whether or not changes in the supply of speculative stocks will result in greater magnitude of changes in the market price of those stocks than increases in the supply of blue chip industrial stocks in producing [fol. 2039] changes in the price of those stocks?

A. Well, I think it would all depend on extraneous cir-

cumstances that go beyond strictly the question of supply and demand. You limited your question to the question of supply and demand?

Q. That is right.

A. And whether the fluctuations in connection with speculative shares would be greater or lesser than they would in connection with blue chip shares, I still think would depend upon circumstances surrounding the specific issues beyond the question of supply and demand.

Q. If I understood your testimony, your conclusion, your ultimate conclusion that there would be a depressant effect upon General Motors is predicated on the simple fact of increase in supply here?

A. I think I also qualified that, Mr. Owens, in my testimony by saying that it would additionally depend upon other factors that prevail at the time that such supply became available over a period of one, two or more years.

Q. But if we limit our consideration as to what the effect of volume alone is likely to be, and exclude for a minute the other influences that may tend to affect it, do you have an opinion with respect to whether or not changes in the supply of speculative stocks will cause greater price changes in that than increases in the supply of blue chip industrials will cause in the price of those stocks?

A. Well, the question I think in that case would depend upon whether a blue chip issue having a volume of supply becomes suddenly available would become other than a blue chip issue.

In such a case, and with the fluctuations, if the investor lost interest or it lost its attraction for him, it could become [fol. 2040] highly speculative and fluctuate as much as a notoriously speculative issue.

Q. You recognize that the history of General Motors is a stock which has had the characteristics of combining current income with growth?

A. We have felt that way for years.

Q. And can you say the same with respect to du Pont?

A. We have also felt that way about du Pont for years.

Q. And do you have an opinion as to whether stocks with those characteristics—do you have an opinion with respect to the degree of cross-elasticity of demand for such securities?

A. Mr. Owens, my answer to your last question was

stated with General Motors in mind. If an over-supply or a volume supply—volume as you call it—became available and forced upon the market——

Q. Don't we have to consider——

Mr. Tierney: I object. Let him finish his answer.

The Court: Complete your answer.

By the Witness:

A. (Continuing)—became forced upon the market, the qualities that had put the price of that stock at the point it was immediately preceding or historically in relationship to other shares, could be sadly deflated or depleted. It is getting back, in my opinion, to just a basic question of supply and demand.

By Mr. Owens:

Q. Well, the purpose of these questions is to try to develop some basis for determining how you regard increases in supply to affect price and to determine whether or not the effect it will have on the price varies, depending upon the type of security involved.

[fol. 2041] Mr. Tierney: Just a minute, please. That is not a question.

Mr. Owens: Well, I think——

Mr. Tierney: Is it a question or is it a statement?

I want the witness to answer your questions, but not to agree with your speeches. Is it a question?

Mr. Owens: No, it is an explanation to the witness.

By Mr. Owens:

Q. Do you understand my explanation, sir?

A. I would like to have it reread.

Mr. Owens: Would the reporter read it, please?

(Record read.)

By Mr. Owens:

Q. Do you understand that?

A. I understand it, Mr. Owens, I mean, I understand what the words say, but if you are directing that question at what our position would be as investors——

Q. Well, don't you have to form an opinion as to the extent to which the price of General Motors is going to be affected by this increase in volume?

A. Well, I cannot recall a single instance in almost thirty years of participating in the investment of funds when we have attempted to master-mind a situation of that kind where there are so many other shares available that do not have this uncertainty surrounding them that we are discussing here, that we would employ our funds elsewhere rather than to attempt to master-mind what is going to happen.

Q. Let me ask you this question, Mr. Herd: Do you have an opinion as to the degree of cross-elasticity of demand [fol. 2042] between the stock of a highly diversified company, such as General Motors, and the stock of a corporation who is not so widely diversified?

A. Well, again, I find myself bogged down, Mr. Owens, on the magic meaning of cross-elasticity of demand. If you could rephrase it so that I could interpret the question, I would like very much to answer it.

Q. Do you have an opinion as to whether increases in the supply of a security of a widely diversified company would cause greater or smaller changes in the price of that security as compared with a less widely diversified stock?

Mr. Tierney: Just a minute. In the question you used the word "supply." Do you have reference to normal supply or to the forced supply which is involved in this case?

Mr. Owens: I have reference to any increase in supply, regardless of from what source it emanates.

By the Witness:

A. Well, that is a type of question in my opinion, that would be almost impossible to answer unless you knew the particular stock that was involved, the conditions in that particular industry at the time that the supply became available, the demand for the stock on the part of the normal investor, and the money situation at the time it was made, and short of knowing all of those factors, I would hesitate to even offer an opinion.

By Mr. Owens:

Q. Do you have an opinion with respect to whether or not increases in the supply of the security of a company

that has a record of consistently paying dividends would produce greater or smaller changes in the price of that [fol. 2043] security as compared with securities on which the dividend record is not one of continuing to pay regular dividends?

A. Would the increase in supply be the result of a stock dividend?

Q. No, as a result of more shares being marketed.

A. By an increase in capital or reduction in capital or a block of stock previously existing suddenly being made available on the market?

Q. I would like to take both those assumptions, sir. Take first the case where it is not new capital, but existing outstanding stock.

A. Well, I think the history has been in the case of shares received as stock dividends that there is a dilution that automatically takes place. You said both assumptions.

Q. Well, I asked you to take first the case where it is an increase in the supply of the stock, such as would be the case on the Government's proposed judgment, that is, it is not new shares, it is merely the marketing of presently existing outstanding shares.

A. But being made available to the public, general investors for the first time, say, in many years?

Q. Well, I am not relating it particularly to that, just any increase in the supply of stock of that character, that is, one that has consistent record of paying dividends. Do you think that that would produce a greater or a less change in price than a stock that did not have such a record?

A. Well, Mr. Owens, I think again you cannot answer that categorically without knowing the specific case that you might have in mind.

A growth company might issue new stock where the stock presently on the market is in short supply; and there should be little or no difficulty in marketing that, maybe, [fol. 2044] in view of the fact that they have a very limited number of shares outstanding at the times they issue the new shares.

Q. Well, Mr. Herd, in these questions I would like you to assume, if you can, that as respects these comparisons, all other factors are equal except the ones to which we address ourselves, namely, changes in the volume of supply.

Now, if we assume that all other things are equal, can

you tell us whether you have an opinion as to whether or not increases in the supply of a stock having a consistent record of paying dividends would produce changes in price that were greater or smaller than the changes in price that might be expected from a stock which did not have such a dividend paying record?

A. I will give you my opinion: That in a situation such as you have just mentioned, an increase in the supply of the available stock for public distribution would have the effect of depressing the market value.

Q. Well, we are interested here in the comparative changes in price, depending upon whether the stock is one having a history of consistently paying dividends or a security that does not have such a record.

Mr. Tierney: If the Court please, I object to that. I don't think we are interested in that comparison. It certainly has no relation to this case.

The Court: Overruled. He may answer.

Mr. Owens: Will the reporter read the question, please?

(Question read.)

By the Witness:

A. Well, don't you get back to the question of the stock which does not have such a record being in the speculative category?

[fol. 2045] By Mr. Owens:

Q. They are related, assuming, other things being equal, whether you have an opinion as to the comparative changes in price that would result from the increases in supply.

A. I think I have answered your question once, Mr. Owens. That was when I drew a comparison as to the blue chip share having stock become available as distinguished from the speculative share having stock become available.

Q. I confess that I didn't understand your answer to the earlier question, nor am I able to understand your answer to this question.

My difficulty, I think, was for a while there that you were assuming that unless you knew all the other factors that would affect these two relationships, or that would affect the market price, you couldn't express an opinion. I think

I had removed the source of the difficulty when I asked you to assume that all of the factors are equal as between the stock, for instance, that has a record of consistently paying dividends and a stock that does not.

Mr. Tierney: If the Court please, I object to this discourse. This is not examination of the witness; it is arguing with the witness. There is no question here.

The Court: Overruled. He may answer.

Mr. Tierney: There is no question, your Honor. What is the question?

The Court: Read the question.

(Record read.)

Mr. Tierney: I object to the form.

The Court: I will sustain it. Rephrase the question.

[fol. 2046] By Mr. Owens:

Q. Assuming all other factors are equal, can you tell us whether or not you have an opinion, Mr. Herd, as to whether increases in the supply of the stock that has a record of consistently paying dividends would produce changes in price that were greater or less in magnitude than the changes of price in a stock which does not have such a record?

A. I have no opinion, Mr. Owens.

Q. You have no opinion, sir?

A. No opinion.

Mr. Tierney: If the Court please, I would like for the record to advise counsel that Mr. Herd was not produced here, as he has told you two or three times, as a market expert. He happens to be charged with the responsibility of handling one of the large institutional investors, a business involving large investors; he is not a market expert. He has told you what he thought would happen, what he would do, and how he would do it. He is not trying to tell you that he is a market expert.

I object to these examinations of the witness as a market expert.

The Court: State another question.

By Mr. Owens:

Q. Do you have an opinion, Mr. Herd, with respect to whether or not increases in the supply of the stock of a company having a history of comparatively large earnings on its equity investment would produce changes in price that were of greater or less magnitude than the changes in price that would result from the increase of supply of a stock that didn't have such a record?

[fol. 2047] Mr. Tierney: I object to the form of that question.

The Court: Sustained. I think the witness has already answered.

Mr. Owens: The last question related, your Honor, to a history of corporations consistently paying dividends. I am now addressing myself to the question of the corporation that has a record of having a high earning capacity on its equity investment, and I think they are quite distinct.

The Court: I didn't recognize the distinction?

Do you want to answer that?

The Witness: I thought I had answered it, your Honor.

By Mr. Owens:

Q. You understand the difference between a record of paying dividends and an earnings record, do you not?

A. I understand that, surely.

Q. Now can you tell me whether or not you have an opinion——

A. I get back to my answer to previous questions, Mr. Owens, in that it is highly imaginative and surmise to——

Q. I am asking you——

Mr. Tierney: Please, counsel.

The Court: Allow him to answer.

By the Witness:

A. (Continuing)—surmise as to whether all things being equal, all the pertinent factors being equal, a sudden supply of shares being put on the market would depress a high earnings company's shares more than it would one of uncertain dividends.

[fol. 2048] By Mr. Owens:

Q. You do recognize that there would be a difference in the degree?

A. I am not sure there would be, depending upon the growth prospects of the company that might have had an uncertain dividend record and a change of management that immediately preceded the issuance of some new shares, where a great many people could see some growth and increase in earnings; and you might have a rise in value in that, as against a decrease in the other.

That is why I hesitate to make any assertion. It looks as if we can give no answer to any and all developments, unless we know the factors that are involved.

Q. Well, I thought we had gotten to the point where we had agreed to assume that all other things were equal.

Mr. Tierney: What things?

Mr. Owens: The other factors affecting the market price other than volume.

By Mr. Owens:

Q. We are interested here in what changes in market price of General Motors are going to occur as a result of the increase in volume.

A. I could make a lot of money if I could answer that question.

Q. Do you have an opinion, sir, with respect to, assuming all other things being equal, whether or not increase in the supply of a corporation that is very widely held would have, as compared with increases in supply of a corporation that is not so widely held?

Mr. Tierney: I object to the form of that question.

Mr. Owens: I will restate the question.

[fol. 2049] By Mr. Owens:

Q. Do you have an opinion, sir, with respect to whether or not increases in the supply of a stock of a corporation that is very widely held would have a greater or lesser effect on the price as compared with increasing the supply of a stock of a company that is not so widely held?

A. In my opinion, sir, it would depend very much upon the nature of the announcement, the publicity which ac-

companied it, and the mass psychology or fear on the part of the widely-held small investor, as distinguished from a closely held, perhaps well informed type of investor.

Now that could work both ways, in opposite ways, in respect to each of those cases.

Q. Well, if you assume with respect to both that that matter is handled in the same fashion, do you have an opinion?

A. Then you get back to the question of the factors and what necessitated it. A voluntary issuance and submission of additional shares for a stated purpose, that where the proceeds are going to be used to enhance the earning capacity, and consequently the figure dividends, is one thing, as against a sudden supply of shares that have come on the market where the proceeds in all probability would not be used for expansion and growth purposes and would not enhance the earnings' value of the shares that were already held by the public, as distinguished from those that were coming on the market.

Q. Does that not depend, sir, upon the judgment of the investor as to how efficiently the funds or the capital of the company are presently invested?

A. I do not believe so. I think the two situations that I have just described could bring about two wholly different results in the market shares of the respective companies.

[fol. 2050] Q. Do you understand the term, "turnover ratio" in relation to stock?

A. I think I do.

Q. Do you have an opinion, sir, with respect to whether or not increases in the supply of the securities of a low turnover ratio would produce greater magnitude of price change than the increase in supply of a security with a high turnover ratio?

A. Are you referring to a listed stock, a stock listed on one of the major exchanges?

Q. Yes. Assume that, if you will.

A. And are you assuming that the stock is a widely held stock or a closely held stock?

Q. Well, assume that it is a widely held stock.

A. And now will you rephrase the question? Or may I ask her to read it?

Mr. Owens: Will the reporter please read the question?

(Question read.)

By the Witness:

A. I think that, too, would depend on the circumstances which brought the additional stock on the market.

Q. Let's assume——

Mr. Tierney: Just a minute, Mr. Owens. Please——

Your Honor, I ask that the witness be permitted to answer his questions.

The Court: Have you completed your answer?

The Witness: I haven't quite, sir.

The Court: Very well, complete it.

By the Witness:

A. (Continuing) If a closely held company with a low turnover of shares had decided to issue additional shares for expansion purposes and growth possibilities, and [fol. 2051] increased earnings prospects, I would expect there to be a lesser impact on the market value than I would if shares coming on the market were not to be devoted to that purpose.

By Mr. Owens:

Q. Let me ask you to assume that in those cases the increase in the supply is occasioned by existing stock and not newly issued stock, comparing the one with the low turnover ratio with the one with the high turnover ratio.

A. There, too, if it is closely held, with a low turnover, that is, a low turnover ratio of the stock that is listed on one of the major exchanges——

Is that your question?

Q. No, only assume one is widely held.

Assume two widely-held stocks, one with a low turnover ratio, one with a high turnover ratio. I want to ask you whether you have an opinion on those assumptions as to whether the increase in the supply in the low turnover ratio stock will produce a greater or lesser change in price than the increase in the supply of the high turnover stock?

A. I don't know. I have no opinion.

Q. No opinion whatsoever?

A. No opinion.

Q. Now, do you have an opinion with respect to the extent to which increases in the supply and demand, rather, increases in supply of the stock of a corporation that has a large percentage of its shares owned by a relatively small percentage of its stockholders as against a corporation, stock of a corporation that is not so widely held?

A. I have no opinion.

Q. You have no opinion?

A. No opinion.

[fol. 2052] Q. Does it appear to you that that would be a relevant factor to consider in arriving at an informed opinion as to the effect of increase of supply on price?

A. It would appear to me to be something that should be weighed.

Q. And you have no idea how you would weight it?

A. No.

Q. In determining what the relative effect of increases in volume would be on the price——

Mr. Tierney: Supply, do you mean?

By Mr. Owens:

Q. (Continuing) Increases in supply would be on price, would you compare that to the investment opportunity of the market as a whole, or just to what percentage that was of newly-issued stocks that were being offered?

Mr. Tierney: If the Court please, I object to this as calling for the opinion of an apparent market expert. The witness is not so qualified.

The Court: Sustained. This witness has disqualified himself as a market expert.

By Mr. Owens:

Q. Do you have an opinion, sir, with respect to whether or not there would be a greater change in price as a result of an increase in the supply of a stock, stock that is recognized and approved as a legal investment for trustees, in comparison with increases in the supply of a stock that is not recognized as a legal investment for trustees?

Mr. Tierney: Same objection.

The Court: Sustained.

[fol. 2053] By Mr. Owens:

Q. Mr. Herd, what do you consider to be the principal determinants of price?

Mr. Tierney: Of what?

Mr. Owens: Of stock.

The Witness: Listed on the big Board or——

By Mr. Owens:

Q. Yes, listed on the big Board.

A. Or on the major Exchanges——

Mr. Tierney: I take it as far as your question goes, it is confined to his business as investing in stocks, not as an expert. What does he look for when he is buying or selling stocks? Is that what you are asking?

Mr. Owens: I am here addressing myself to his testimony in relation to what the effect of this increased volume is going to have on price. In that connection, I want to know what he considers determines the price.

Mr. Tierney: You mean under the Government's decree and the forced sale of twenty million shares, you want to ask him if it has any effect on his opinion as to what he would do?

Mr. Owens: I want to explore the basis for his opinion, your Honor. It is quite clear what his opinion is, and the weight that should be attached to that opinion depends on how closely he reasons the factors in arriving at that opinion.

The Court: State your question.

[fol. 2054] By Mr. Owens:

Q. What is your opinion, Mr. Herd, with reference to the degree of correlation that exists between the yield on a stock and its price?

Mr. Tierney: Same objection.

The Court: Sustained.

Mr. Owens: If your Honor please, I don't see how we can attach any weight to this witness' testimony unless we are able to explore how he considered price changes to occur, and what are the factors that induced those changes.

Mr. Cox: Why don't you ask him that, Mr. Owens? Ask him how he appraises prices in his business.

The Court: That is a different question.

Mr. Owens: I am sure that they will have an opportunity on redirect to ask the questions they want, and I would appreciate it if you would let me conduct this examination.

The Court: There is a difference. The first one calls for expert opinion generally, as a market expert. This other one does not.

Mr. Cox: I shall fet h Mr. Owens an elementary work on the law of evidence.

By Mr. Owens:

Q. In making determinations in connection with your business, do you recognize the degree of relationship between yield and price, sir?

A. That would be one of the factors entering into the evaluation of shares in the investment department.

Q. How important a factor is that to you, sir?

A. It all depends again on many other factors that are [fol. 2055] weighed when the Investment Finance Committee is making a decision as to whether they are going to employ our funds.

Q. Is it a highly relevant factor to you?

A. It could be, and again it could be a minor factor.

Q. In making the investment decision for your company, what weight do you attach to price earnings ratios, sir?

A. We do not have a slide rule that we apply to it.

Q. But is that a highly significant factor in your analysis?

A. I said it could be highly significant in some issues and much less significant in others.

Q But generally among the factors that you consider, do you consider that a primary factor?

A. It is a primary factor as a general rule.

Q. Have you in reaching your conclusion that the Government's proposed plan would have any depressing effect upon the price of General Motors assumed that there would be any change in the General Motors management as a result of this proposed judgment?

A. No.

Q. Have you assumed that there would be any change in the growth prospects of the General Motors Corporation as a consequence of the Government's proposed judgment?

A. I think——

Mr. Tierney: I don't know what you mean by growth. What do you mean by growth? Growth of the stock market or what?

Mr. Owens: Growth of the company.

By Mr. Owens:

Q. Do you understand the phrase growth of the company?

A. I understand, I think, what you are directing yourself to, and I would not look at an investment in General [fol. 2056] Motors today in retrospect as having the same growth prospects as it had twenty-five or thirty years ago, so that it probably would be a factor that would play not so important a part in our deliberation as to whether we were to make a new investment in General Motors stock.

Mr. Owens: I move to have the answer stricken, your Honor.

The question I asked him was whether or not he thinks that there is any change in the growth prospects of the General Motors Corporation based on or assuming the entry of the proposed judgment by the Government.

The Court: Read the answer, please.

(Record read.)

The Court: I think that is directly responsive. The motion is overruled.

Mr. Owens: Read the answer back again, please. I don't understand.

Never mind reading it back.

By Mr. Owens:

Q. Let me ask you, in what may be a more abbreviated form, I think, Mr. Herd, whether or not in reaching your conclusion as to the depressant effect of the entry of the Government's proposed judgment, have you assumed that that would cause any change in the growth prospects of General Motors?

A. From an investor's viewpoint, and I must base this on another assumption, and that is whether an investor would look at available General Motors stock today as hav-

ing the same growth prospects, whether or not these additional shares would come on the market.

[fol. 2057] Just speaking from my own investment attitude, I don't believe that we would look at a fresh supply of General Motors stock for the employment of new funds as having the inherent growth qualities that it had twenty-five or thirty years ago.

Now, that is not said in derogation of General Motors Corporation or its management, but there are a great many things in the picture today as to antitrust and other factors that weren't in evidence twenty-five, twenty-six, twenty-seven years ago.

Q. I understand your answer to be that the growth prospects today are different than they were twenty-five or thirty years or so, or some other period of time?

A. Yes.

Q. I am asking you, analyzing it as of today, whether or not you have assumed that the entry of the Government's judgment would produce an effect upon the growth factor of General Motors, starting from now and viewing it from now?

A. I don't want to get too technical, Mr. Owens, but there could be a morale factor within the General Motors Corporation that could do quite a bit towards slowing it down as a corporation. But let's forget that for the moment and let's also forget the investment question that is involved here.

I would say that the appearance of these shares on the public market ought not to make any difference in the growth prospects of General Motors if they hadn't them, as compared with the situation that existed if they hadn' appeared, except for these tangibles that I am not prepared to elaborate on, but you can't ignore them.

Q. Now, have you made in your investment department [fol. 2058] various analysis of the prospects of du Pont and its soundness as a security investment?

A. No, we have not.

Q. I thought I understood you to say on direct examination in response to a question propounded by Mr. Tierney that your company makes an annual inventory analysis of the securities in portfolios held by the companies you are associated with.

A. Correct.

Q. And doesn't that include an analysis of the corporation and the securities?

A. It does.

Q. Does your analysis of the du Pont Corporation recognize the contribution to the soundness of the security that its earnings stemming from its investment in General Motors causes or produces?

A. Our analysis for du Pont for several years has recognized the presence of the General Motors shares—our equity through du Pont in General Motors. I think that is your question. It has always referred to it, but I misunderstood then your question as to whether it had analyzed the effects of this distribution of stock. So I misunderstood your question.

Q. And having considered what your investment is in the automotive industry as percentage of your total investments, do you recognize that portion of your investment is to be recognized as an indirect investment in the automotive industry?

A. We do not give the same weight to our indirect holdings of General Motors stock via the du Pont shares as we would if we had the same General Motors shares directly held by us.

Q. What are the factors that go into your giving them different weights?

A. The General Motors shares as held by us, we identify as having us in the automotive industry and primarily exposed to vagaries and vicissitudes of that industry. The General Motors shares that we hold indirectly via the [fol. 2059] du Pont group would also have to be evaluated and weighed in the light of the fortunes of the chemical industry, and the other things that the du Pont Company is dependent upon to secure their dividends and to pay on.

Q. Well, don't you recognize that the earnings of the du Pont Company on its General Motors stock are a factor or a reflection of the prospects and the experience of the automotive industry rather than the chemical industry?

A. The last figures I saw indicated that du Pont was dependent about 28 or 29 per cent on its General Motors holdings for its income, and we weighed that carefully, but their 71 per cent that arises from other than the auto-

motive industry largely, that is quite a diversification within our du Pont holdings.

Q. That is, that 71 per cent of the earnings?

A. 71 per cent of the last figures I saw of the du Pont earnings were not dependent upon their equity in the General Motors shares.

Q. But in appraising——

Mr. Tierney: If the Court please, I object to this examination with respect to the du Pont stock. We did not go into it on the direct examination and I object to it on cross examination. We went into it on direct only to show that we had so much du Pont stock and because of that we would get so much General Motors stock.

The Court: That is correct. If it was not covered on direct——

Mr. Tierney: It was not covered on direct.

The Court: Then it is not proper cross examination.

Mr. Owens: Well, if your Honor please, I believe [fol. 2060] Mr. Herd testified as to what his appraisal would be of the General Motors stock that he would receive under the Government plan and whether he would hold it or keep it. I am trying to find out what the essential difference is in the situation where he owns it indirectly through du Pont as to whether he would hold it directly through distribution.

The Court: Well, as to what he would do with the General Motors stock on account of the investment of du Pont would be proper——

Mr. Tierney: I agree with that but that is not the question.

The Court: The balance as to du Pont is not relevant.

Mr. Tierney: I suggest you ask that question. I would like to hear his answer.

Mr. Owens: Well, you will have an opportunity to ask that, if you want, Mr. Tierney.

By Mr. Owens:

Q. You stated on direct examination, I believe, Mr. Herd, that upon a distribution of the General Motors shares to you, you would reexamine your portfolio at that time, is that right?

A. That is correct.

Q. And that you would give consideration to selling General Motors?

A. We would give full consideration to our new position in the automotive industry via General Motors shares which, on the basis of the arithmetic as it now stands, would raise our stake in General Motors from 22 to 30 million dollars—or from 12 to 20. I am sorry. It is from 12 to 20 million dollars.

Q. You mean that would raise the stake that you have directly?

A. Correct.

[fol. 2061] Q. You have that stake now indirectly through du Pont, do you not?

A. I have described the difference in our attitude between an indirect and a direct holding.

Q. But you stated, I believe, that one of your considerations in investing was to have your investments produce the income that would be available to pay out to the stockholders of the various insurance companies with which you are associated?

A. That is one of the considerations.

Q. Do you recognize, sir, that the dividends, General Motors dividends that are paid out to du Pont on the basis of its present holdings can either be paid out to the du Pont stockholders or retained in the du Pont Company's business?

A. That would seem to be apparent. I have never given it any study.

Q. Well,——

A. But if that is the case, why, that is the case.

Q. But you know that the Directors of du Pont have a capacity to pay out that earnings from General Motors or to retain it for use in the company, do you not?

A. I should think they would, yes.

Q. And if there were a distribution of the General Motors stock to the stockholders of du Pont, those dividends would be received by the du Pont stockholders and would not be subject to that discretionary action of the du Pont Board of Directors, is that correct?

A. Well, you are assuming the du Pont stockholders would retain the General Motors stock?

Q. Assuming they retained their stock, yes.

A. I imagine that whatever dividend policy General Mo-

tors pursued would apply direct as well as it does presently to du Pont.

Q. Well, then there would be a greater certainty of [fol. 2062] receiving G.M. dividends if you owned directly, as distinguished from owning it directly through du Pont, is that not a fact?

A. Well, that gets back to our question of diversification. That is presupposing that the du Pont fortunes and earnings justify a continuation of a dividend rate. It also assumes that if du Pont's income was depleted by a reduction of dividends from General Motors, or assuming that the stock stayed in the du Pont family, that du Pont would correspondingly reduce their dividends to the du Pont stockholders.

Can you presuppose that du Pont is not making up that loss of earnings through one of their other activities?

Q. Well, as being a stockholder of du Pont who receives the General Motors stock on a distribution, there is a greater certainty that he will receive the G.M. dividend if he owns it directly, is that a fact?

A. Well, whatever it may be.

Q. Whatever the G.M. dividend may be?

A. Yes. That is axiomatic.

Q. Now, you stated, I believe, that one of the considerations that you would take into account in evaluating what you would do in your company with respect to the G.M. stock dividend received would be the tax consideration, is that correct?

A. We would weigh that, yes.

Q. What have you assumed with respect to the cost basis of the General Motors stock that you would receive as a stock dividend, sir?

A. If my memory is correct, the distribution of the du Pont stock, 170,000 shares would come into the portfolios of our companies at a tax cost of $2.10 a share.

We would inherit the du Pont cost.

[fol. 2063] Q. And if you were to undertake to dispose of that stock, do you know what the tax liability would be?

A. It would be 25 per cent of the difference between $2.10 and the market value on the day of disposition.

Q. And would that be a relatively high degree of capital gains compared to other securities in your portfolio?

A. It would.

Q. And of what tax rate would that be?

A. 25 per cent under present law.

Q. Would that dispose you or would that increase the probabilities of your disposing of it or decrease the probabilities of your disposing of it?

A. Well, the General Motors stock that we presently have in our portfolio has a tax cost of around $11 or $12, so we would probably retain the du Pont stock that we would receive—rather, the General Motors stock that we would receive from du Pont at $2.10, and——

Q. First?

A. And sell—if any, sell the stock at a higher tax cost, which would lessen the impact of the capital gains; but the tax exposure would not be the controlling factor in whether or not we retained what we considered to be an oversupply of General Motors stock if it was not in keeping with our diversification policy.

Q. Well, you would experience a reduction in the proceeds of 25 per cent?

A. We would not be at all happy about the position we would be left in, because we would consider ourselves still locked in by a $2.10 per share cost where there is a substantial capital gains exposure based on that cost.

Q. That would also be true with the GM stock that goes at $11, would it not?

A. No. We have lightened our load in General Motors stock quite considerably in the past few years, but that is [fol. 2064] in keeping with our diversification program, and we have also sold quite a few other blue chip shares, as I reported this morning—the IBM and the others in that category.

Q. You mentioned, I believe, on your direct examination, that one of the factors that you give considerable weight to in forming your opinion is the liquidity of the assets?

A. That is correct.

Q. In the event that you were called upon to satisfy some of these possible liabilities under your insurance policies, such as you suggested, would it be your disposition to sell those securities that have the smallest capital gains tax liability?

A. I think we would have to relate that to several other factors, Mr. Owens. One is, we would have to realize cash with as little punishment to ourselves on the depressed

market as we could, because if we were in a position of having to sell, probably several other companies would be at the same time, and we would try to find something that was not under quite the same pressure in general liquidation as other things that we might have.

So I think that being able to get a fair market price for what we have to sell would be more attractive to us than looking in the first instance at the exposure to the capital gains under those circumstances.

Q. I think you testified that you had 123 thousand some odd shares?

A. And 300.

Q. And that on a distribution you would get 1.38 shares of GM for each share of du Pont over the 10-year period?

A. Yes.

Q. That would result in your receiving 170 thousand some odd shares of General Motors?

A. In round figures, yes.

[fol. 2065] Q. Do you know what the annual dividend rate of General Motors is?

A. $2 per share, is my recollection.

Q. So that upon receipt of the General Motors dividend on the distribution if you had 170,000 shares, you would be receiving $340,000 in dividends on the GM stock, is that right?

A. Assuming a continuance of the same rate, that is correct.

Q. That is without any extras or unusual dividends?

A. Yes.

Q. Do you know what the effective rates of intercorporate dividend taxes are?

A. In our case?

Q. In any case?

A. My recollection is six per cent.

Q. Well, let me ask you to assume—I think it is agreed by the attorneys in this action that the effective rate is 7.8 per cent.

A. Well, that is the 15 per cent of 52 per cent.

Q. 52 per cent of 15 per cent?

A. Yes.

Q. It comes to 7.8 per cent.

A. All right.

Q. So if you were receiving, or holding the shares of

General Motors directly, $340,000, and that at the present time as the result of your receiving such dividends as were paid out by du Pont on its earnings from General Motors, they are subject at that point through du Pont to an additional effective tax on those dividends of 7.8 per cent, do you understand that?

A. I do.

Q. So I calculate on the $340,000 in dividends that you would receive in General Motors stock, if you held it directly—you would receive an additional twenty-six thousand some odd dollars, as compared with the dividends that you would receive now, assuming du Pont paid out all the earnings it receives on its GM stock.

Have you taken that into consideration, sir?

A. Well, we would be exposed to the same tax.

[fol. 2066] Q. You wouldn't be exposed to that tax, would you?

A. We are exposed, though, to the 7.8 per cent on the three hundred and forty thousand as a——

Q. That may be an additional 7.8 per cent, sir?

A. Well, there would be probably an abatement of one tax step, which would be the General Motors to du Pont; but, in the General Motors to us, we would pay the same tax, that is, 7.8 per cent on the $340,000.

Q. But even before that the 7.8 per cent of the General Motors dividends would be saved by your owning the General Motors stock directly would it not?

A. Maybe I can help you a little bit by pointing out that the tax considerations that go on within an operation such as ours will, I think, change the customary arithmetic that would apply in a non-insurance receipt; in other words——

Q. This is with respect to the liability, on whatever tax liability exists on whatever you receive?

A. Yes, all right.

Q. If this is a reduction in the amounts you receive, those differences won't make any difference, will it?

Mr. Tierney: If the Court please, apparently counsel cannot learn that he should not be impolite and interrupt the witness.

The Court: Complete your answer.

Mr. Tierney: I would like to have the Court admonish him to please let the witness answer the question.

The Court: I don't think he is doing it intentionally.
Mr. Tierney: Irresponsibly, then, perhaps.
The Court: Finish your answer.
The Witness: I had finished, your Honor.

[fol. 2067] By Mr. Owens:

Q. Do you know what the annual increase would be on each share of General Motors or rather on each share of du Pont that you had received as a consequence of a distribution of the General Motors stock to you?
A. No, I have not analyzed that.
Q. Have you considered, sir, what the tax liability would be upon the receipt of the General Motors dividends?
A. Well, it is rather—I think you almost mentioned the figure. It would be predicated upon the $2.10 per share times one hundred and seventy thousand shares, times the applicable tax rate.
Q. Have you been advised that that tax would be approximately sixteen cents a share?
A. I heard counsel for the Government mention it this morning.
Q. And do you know that there would be a 22 cent increase in the annual income on each share of du Pont as a result of holding stock directly as against indirectly?
A. That is a figure that I hadn't analyzed.

Mr. Tierney: I object, your Honor.

By Mr. Owens:

Q. Do you consider it relevant to weigh that factor?

Mr. Tierney: I object to that. It is not proper cross examination.
Mr. Cox: It is not a fact in evidence, your Honor.
The Court: Sustained.

By Mr. Owens:

Q. Are you familiar, sir, with the various alternative methods by which the stock might be marketed?
[fol. 2068] Mr. Tierney: If the Court please, I think this is improper cross examination.

The Court: Sustained.
Mr. Owens: I don't understand the basis of the objection. He was talking about whether or not, on direct ex-

amination, marketing of this quantity of securities would affect the market price; and I am trying to explore with the witness whether he has considered the extent to which different methods of marketing might produce different results in terms of effect. If he has not, I think it would be a very material factor in the weight to be attached to his opinion.

Mr. Tierney: Perhaps if his testimony is to be weighed, but he didn't testify to the facts that counsel has said he did.

Mr. Owens: He is testifying with respect to the conclusion on the depressant effect on the market price.

The Court: All right, the ruling stands.

By Mr. Owens:

Q. In reaching your conclusions with respect to the depressant effect on General Motors stock of the marketing under the Government's proposed judgment, Mr. Herd, have you considered the purchases by General Motors of its own stock?

A. I have weighed that, yes.

Q. What are the factors with reference to that, that you took into consideration?

A. The fact that that had been going on and was taking an available supply in the normal market.

Q. Would you consider purchases—do you know what the quantities of the purchases have been, sir?

A. I think I heard the quantity, in the neighborhood of a million shares a year.

[fol. 2069] Q. That is purchases by General Motors of its own stock?

A. I have been so informed.

Q. Do you understand those purchases to be taking place on the exchange?

A. That is what I have been told.

Q. Do you know what percentage GM's purchases have been of total transactions of General Motors' transactions on the exchange?

A. I do not.

Q. Does it appear to you, sir, that that percentage is a relevant factor in assessing the weight to be attached to those purchases?

A. I would have to know, sir, whether the purchases were a voluntary act, or whether it was a compulsory thing.

Q. Assuming either case, does the magnitude of those, of those purchases, in terms of total trading of General Motors stock, make a difference in your opinion, sir?

A. It could be a very important factor.

Q. It could be——

A. In the trading of General Motors shares.

Q. Would you consider a corporation's purchases of its own stock on the New York Stock Exchange to be a normal factor in supply and demand?

A. If the stock that it was purchasing was stock that was readily available to other investors in a normal market, a free market, it is not a factor that is to be ignored.

Q. Well, do you draw a distinction at all as to whether or not this would be—its influence were 25 per cent of the total trading, 50 per cent, or 75 per cent—as to whether or not it is a normal supply and demand situation?

A. No. I understood that for several years on an annual basis an average of approximately a million shares have been purchased in the open market, the timing of which [fol. 2070] was entirely at the discretion of the people who were making the purchase, and it could be in greater or lesser quantities and attuned to the available supply; and if that supply was from individual holders, that it could be quite a factor if it were suddenly removed from the purchasing side of the General Motors shares.

Q. Well, do you have an opinion, sir, with respect to whether or not the matter of purchasing securities in that quantity would affect the market price?

A. I would have no opinion on that.

Q. Pardon?

A. I would have no opinion.

Q. Then you have made no examination of that question?

A. None whatever.

Q. Does it appear to you that it is likely that the manner in which such purchases are conducted would have an effect upon the extent to which it would tend to increase the price of General Motors?

Mr. Tierney: May I have that question read back, please?

The Court: Read the question.

(Question read.)

The Court: He may answer.

By the Witness:

A. It would.

By Mr. Owens:

Q. It would?

A. It would.

Q. If I suggest to you, sir, that those purchases are made on a basis so that the purchaser, that is the General Motors Corporation, in entering a bid, does not at any time establish a new high for the stock, and only occa- [fol. 2071] sionally enters an order at the market, do you have a judgment as to the extent to which that would affect the probability of those purchases increasing the price of the security?

Mr. Tierney: I object to that as calling for a conclusion, your Honor——

The Court: Sustained.

By Mr. Owens:

Q. Do I understand your assumption with respect to the marketing of the securities is that this would be done? Did you make any assumption at all as to how it would be done, that is to say, whether it would be sold on the Exchange by a series of secondaries?

A. I don't recall having addressed myself to that at all, sir.

Q. You have not considered that in any connection?

A. In a very casual and general manner, not specifically.

Q. Not specifically?

A. No.

Q. Have you considered, for instance, the probability that all the shares would be bought by a single purchaser or by a single organized group of purchasers?

A. I have given no thought to that.

Q. I beg pardon?

A. I gave no thought to that at all.

Q. Well, assume that situation——

Mr. Tierney: Assume what, that the 63 million shares would be bought by some purchaser?

Mr. Owens: I have not stated what my assumption was, and if you will let me continue——

Mr. Tierney: You said "assume that."

Mr. Owens: That is the point at which you interrupted me, Mr. Tierney.

Mr. Tierney: I am sorry I interrupted you.

[fol. 2072] By Mr. Owens:

Q. Will you assume that with respect to the shares to be marketed by the trustee, that a single purchaser or an organized syndicate group were established to purchase those shares of stock, would that affect your conclusions, sir?

Mr. Bushby: I object; two different, entirely separate conclusions and assumptions in one sentence. One says purchaser, and the other is a marketing syndicate. They are quite different.

Mr. Owens: I am talking about a purchasing group. Perhaps I can clarify the question for you, Mr. Herd, to meet Mr. Bushby's objections.

By Mr. Owens:

Q. I want to ask you whether or not it would make any difference in your conclusion as to the depressing effect on the General Motors stock in the event that the stock to be sold by the trustee were purchased by a single purchaser or by a group of associated people who arranged to buy that stock as it became available?

A. Well, I find it difficult, Mr. Owens, to imagine three billion dollars in round figures being available to absorb a block of 63,000,000 shares of General Motors in one gulp. For that reason, I would be inclined to address myself to my former answer, that is, I have no opinion as to whether that would have the effect of depressing the market value of the shares or not, because I think it is rather unreasonable to assume that.

Q. Well, if you will indulge that assumption, sir, would you tell me whether or not it would change your opinion

with respect to the depressing effect on General Motors stock?

A. Assuming you get three billion dollars to absorb sixty million shares——

[fol. 2073] Q. No, we are talking about the amount, assuming a group purchased the amount sold by the trustee, sir.

A. That is the 20 million shares?

Q. That is right.

Mr. Cox: At what price would they buy it? Will you state that as part of the assumption?

By Mr. Owens:

Q. At the then current market price, substantially the same market price?

A. I would prefer not to express an opinion on that.

Q. Does that not appear to you to be a highly important factor in reference to this matter?

A. Well, it seems to be highly improbable.

Q. I am asking you to indulge the assumption, sir.

A. If you wish to indulge in an assumption, it could make a difference.

Q. Could you tell me what that difference would be, in your judgment?

A. No, that is where I would ask to be excused.

Q. Are you stating that you are unable to answer the question, sir?

A. You are asking me what the difference would be, and I can't tell you what the difference would be because I don't know what the prices would be before and after or during.

Q. Well, I recognize that you don't have a crystal ball.

A. But I did answer your question by saying that I thought it could make a difference, but what the difference would be, I certainly feel highly incompetent to respond to.

Q. You are unable to measure the difference it would have in its depressing effect on the market price of GM?

A. Quite.

[fol. 2074] Q. In such an eventuality?

A. Quite.

Mr. Tierney: If the Court please, may I suggest that this witness is here from New York, and I think he should get

through with him. If you will indulge us for a few moments, I would like to get him home tomorrow morning.

The Court: Very well.

By Mr. Owens:

Q. I take it from your previous answers, Mr. Herd, that in preparing for your testimony here with respect to the possible depressing effect on General Motors stock as a result of the Court's ordering the Government's proposed divestiture that you did not make any examination of previous secondary issues?

A. Correct. I did not.

Q. Did you make any examination of the marketing experience in connection with new public offerings?

A. I did not.

Q. Did you make any examination with reference to rights offerings to shareholders of large quantities of stock?

A. I did not.

Q. Did you not address yourself to that problem because in your judgment, it was irrelevant or because of considerations of time or the scope of your commitment?

A. Because I was appearing here as someone who was employing institutional funds in the investment to a large extent in equities and was to reflect what I thought would be our attitude towards certain situations, and not the technical circumstances that might underlie certain situations.

Q. Did you consider it relevant to the determination of the mechanics by which the marketing would be done?

[fol. 2075] A. I considered it to be relevant but not controlling in our decisions as to whether or not we would take certain actions.

Q. Well, you have not taken any action as yet, I understand, with respect to your shares based on the possibility of that divestiture?

A. Not as yet as a result of this current situation.

Q. Prior to making the determination with respect to that issue, would you undertake to have the experience of alternate modes of marketing examined before you reached a decision?

A. Well, we would avail ourselves of all the information and technical know-how that we could. We would still

weigh many of the factors and all of the factors that I have reported on earlier here today in making our final decision.

Q. Are you acquainted with any situation where the courts have ordered divestiture?

A. As I sit here, I recall none.

Q. You are not acquainted with the divestiture of shares of Aluminium Limited?

A. I am not intimately acquainted with it; just a casual knowledge of it.

Q. Would it appear to you to be a relevant factor to be studied by your organization before making a decision with respect to the effect of market price?

A. If there is any parallelism between that and what might develop here, why, of course, we would study it.

Q. Have you examined it as to whether there is any parallelism?

A. I have not.

Q. So I take it, then, you have given no consideration to the experience in divesting shares of Aluminium Limited?

A. No.

[fol. 2076] Q. You have stated, I believe, that your organization holds no Ford stock, is that correct.

A. I don't recall having stated that, Mr. Owens.

Q. Does your organization hold any Ford stock?

A. We inherited 10,000 shares of Ford by a purchase of another insurance company, but we have not of our own volition ever invested any money in Ford.

Q. Have you made any study in connection with your testimony of the prospective Ford issue of 2 million shares?

A. Have I said anything about it?

Q. No. I am asking you as to whether or not you have made any study of the prospective offering of 2 million shares.

A. None.

Q. Do you see any analogy between the marketing of the shares of Ford Motor Company and the marketing of shares of the General Motors stock required to be divested under the Government's proposed judgment?

Mr. Tierney: I object to that. The witness has said he has made no study.

The Court: Sustained.

By Mr. Owens:

Q. Would you consider such a study to be relevant to forming your opinion with respect to this matter, Mr. Herd?

A. We probably would explore it, but whether it would be relevant or not, I am not sure, until I got into it.

Q. You are acquainted with the degree of diversification between Ford and General Motors?

A. The degree of diversification between them?

Q. Comparative diversification of Ford, as compared with the diversification of General Motors?

A. You mean the character of the stock, or the character of their operations as motor companies?

[fol. 2077] Q. I mean the extent to which Ford Motor Company is diversified in comparison to the extent to which General Motors is diversified.

Mr. Tierney: I object; not proper cross-examination.

The Court: Overruled.

By the Witness:

A. I am sorry, Mr. Owens. Are you talking about the operations of the Ford Motor Company versus the General Motors Company?

By Mr. Owens:

Q. Yes, the relative degree of diversification of Ford as compared to General Motors.

A. Yes. I think I have a general knowledge of that, yes.

Q. Are you aware, for instance, of the fact that something like 87 per cent of the consolidated sales of Ford Motor Company is based on sales of passenger cars and trucks?

A. I wouldn't have known that if you hadn't told me.

Q. Would the experience in connection with the marketing of that quantity of stock appear to you to be a relevant factor to be studied?

Mr. Tierney: I object to that as not proper cross-examination:

The Witness: I just answered that.

The Court: Sustained.

Mr. Owens: We have no further questions, your Honor.

The Court: Are there any other questions?

Mr. Tierney: No further questions.

The Court: You are excused.

(Witness excused.).

[fols. 2078-2079] (Whereupon an adjournment was taken in the above-entitled cause to Tuesday, March 24, 1959, at the hour of 10:00 o'clock a.m.)

[fol. 2080]

Transcript of Proceedings of March 24, 1959

The Court: Proceed, please.

Mr. Gribbon: We will call Mr. Kingsley Kunhardt.

KINGSLEY KUNHARDT, a witness called on behalf of the defendant, E. I. du Pont de Nemours & Company, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Gribbon:

Q. Will you state your name for the reporter, Mr. Kunhardt?

A. Kingsley Kunhardt.

Q. Where are you employed, sir?

A. The Guaranty Trust Company of New York.

Q. What is your position with the Guaranty Trust Company?

A. I am a vice-president.

Q. In charge of what department?

A. Investment Department.

Q. For how long have you been employed by the Guaranty Trust Company?

A. Thirty-seven years.

Q. Are you in charge of the Investment Department?

A. I am.

Q. For how long have you been in charge of the Guaranty Trust Company's Investment Department?

A. About thirty-five years.

Q. The Guaranty Trust Company is located in New York City, is that correct?

A. It is.

Q. Do you know what the relative size of the Guaranty Trust Company is among the commercial banks in this country?

A. It changes from time to time, but it is roughly fourth —fourth or fifth.

Q. Fourth or fifth largest bank.

Does the Guaranty Trust Company have investment responsibility for the funds of pension trusts?

A. It does.

[fol. 2081] Q. Is the discharge of that responsibility among the functions of the Investment Department?

A. Insofar as the problems involve investment questions.

Q. Insofar as it is a question of investing the pension funds?

A. That is right.

Q. It is within the jurisdiction of the Investment Department?

A. That is right.

Q. How many pension trusts does the Guaranty Trust Company have investment responsibility for?

A. Two hundred and seventeen.

Q. And can you tell us in approximate figures the total market value of the assets of the pension trusts administered by Guaranty Trust?

A. That is a rather carefully kept trade secret, but let us say it approaches two billion dollars.

Q. It approaches two billion dollars?

A. Yes.

Mr. Gribbon: I ask your Honor that the reporter mark for identification as du Pont Exhibit No. 38 a list of companies headed, "Partial List of Corporations Whose Pension Profit Sharing or Thrift Plan Trusts are Administered by Guaranty Trust Company of New York."

(Thereupon said exhibit was marked Defendant du Pont Exhibit No. 38, for identification.)

By Mr. Gribbon:

Q. Will you examine this copy of du Pont Exhibit No. 38 for identification, Mr. Kunhardt?

Can you tell us what that list is?

A. This is a list that was gotten up by our new business men, sometime last summer, to give them some data when [fol. 2082] customers, prospective customers, might ask who we served as trustee of pension funds, and is just a list taking large, small, medium sized companies that we happen to serve among the 217.

Q. It does not purport to be a complete list of the pension trusts administered by Guaranty?

A. No.

Q. You say this was used in the ordinary course of business in advising customers as to the extent of your experience?

A. That is right.

Mr. Gribbon: I ask that du Pont Exhibit 38 be received in evidence.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Defendant du Pont Exhibit No. 38.)

By Mr. Gribbon:

Q. Is the responsibility of the Guaranty Trust Company for the investment of pension trusts spelled out in the instruments that establish those trusts?

A. Yes.

Q. To what extent, if any, does the Guarantee Trust consult with the company that establishes a pension trust with respect to investment policy of that trust?

A. Well, it consults with all of their customers with regard to investment policies, broad investment policies.

Q. What are the nature of the consultations that Guaranty Trust might have with a company establishing a pension trust?

A. The usual one of course is to find out to what extent the Board of Directors of the company is willing to take the risks and hoped-for advantages in purchase of common stocks, so we have made it a practice to ask all those companies that have established trusts with us, to

[fol. 2083] give us a percentage figure representing the maximum risk that they are willing to take in the purchase of common stocks, or for their account to hold in common stocks at any one time, the maximum amount.

Q. And that maximum amount is expressed in terms of a percentage?

A. That is correct.

Q. And in the experience of Guaranty, what is the range of the percentages that the customers have so indicated to you?

A. From zero to 100 per cent.

Q. In other words, some of the companies will permit you to put up to 100 per cent of the fund in common stock?

A. That is correct.

Q. And some of them want none of it in common stocks?

A. That is correct.

Q. And the figures are all the way in between zero and 100 per cent?

A. That it right.

Q. Do you find that in the conduct of your investment policy you have abided by the suggestions of the Directors of the companies establishing these trusts?

A. Oh, yes.

Q. How do you account, Mr. Kunhardt, for the variation in the limitations which the companies have stated as to the amount of the fund to be invested in common stocks?

A. Well, Boards of Directors are human beings, and human beings have all sorts of attitudes toward the matter of taking risks, and the responsibility they think they have to employees; and their natural outlook on life and business.

We have many that are very speculative people; we have others who are desirous of making as much money as possible, even at some risk, in order to, as soon as possible, cut down the necessity of adding funds to their pension fund, or at least reducing that; others who feel that their [fol. 2084] responsibility is primarily to employees, and they want to keep good employee relations; they don't want to show any dangerous speculative action, which some people consider the purchase of the best common stocks as being, and they'll want you to go entirely into bonds.

There are other factors that enter into it—the nature of the company's business. For example, in the case of a

utility, I think you have had some testimony as to the American Telephone Company here. Well, the Telephone Company—the contribution to a pension fund is part of their expenses in figuring rates. So as far as the Telephone Company is concerned, it makes no difference whether they make a lot of money or not, but they are anxious for their customers to have as low rates as possible, and they are now starting in a small way to buy some common stocks, because they think they may work out or give them a degree of diversification.

Q. But, in essence, the individual requirements of companies establishing pension trusts must be taken into account, in the conduct of the investment policy of their trusts?

A. Oh, yes. They cover the whole gamut of economic desires.

Q. Do you find that the companies establishing the trusts advise you with respect to a particular common stock to be purchased?

A. Practically never.

Q. Once the limitation as to the amount of the fund going into common stock is established, the choice of stock is up to you?

A. That is right.

Q. Did you say that you have some funds that have no part of their portfolio invested in common stocks?

A. I did.

[fol. 2085] Q. How many?

A. Twenty.

Q. Once a limitation on the amount of the fund to be invested in common stocks has been established, it is the practice of the Guaranty Trust Company to keep that fund fully invested up to that percentage in common stocks?

A. No.

Q. What considerations would lead you to have it lower than that percentage?

A. Well, if we didn't like the outlook for the market or something of that sort, we would keep 20 per cent, we will say, in some other type of security, maybe a short term security, with a view when we did like the outlook for the market better of investing it. We have seldom been up to a hundred percent excepting through the appreciation of the market.

Q. You say a hundred per cent, I take it you mean——

A. A hundred per cent of the maximum.

Q. Of the limitation?

A. Yes.

Q. If the limitation is 25 per cent then your testimony is that you seldom would be up to 100 per cent of that 25 per cent?

A. In the way of purchasing, though we have gotten above the 25 per cent due to appreciation in the market.

Q. By the way, are these limitations on your investments in common stocks expressed generally in terms of market value of the fund or the cost basis?

A. In almost all cases the market value. That is, after all, the more important factor.

Q. Are there any notable exceptions to that?

A. Yes, the General Motors fund.

Q. That is based on——

A. On book.

Q. On book cost?

A. Yes.

Q. Within the limitation that you have expressed with respect to the portion of the fund that can go into common [fol. 2086] stocks, do you follow a policy of diversification in deciding upon the common stock investments for pension funds?

A. Oh, yes. That is one of our more important things we have to do.

Q. Would you explain how you implement this policy of diversification?

A. Well, it is really in three steps.

The first step would be to decide what percentage of the market we want to invest.

The second step would be to decide how the money so allocated would be distributed among industries.

The third step would be to decide what, if any, companies in the individual industries in which we want to invest should be selected for purchase of their common stocks.

Q. Does the Guaranty follow any self-imposed limitation as to the extent it will invest in the common stock of any single company?

A. You mean taken for an individual account?

Q. Yes.

A. No. There is no really fixed figure, no.

Q. You could invest up to five per cent of the funds of a single account in one common stock?

A. Well, we have never reduced it to writing, but we never would, because we would want to have 30 or 40 common stocks in a fairly respectable portfolio, and that in itself would bring it down materially below any five per cent figure.

Q. But that is a very flexible arrangement?

A. Oh, yes, and the changes and the difference in the common stock and the quality of the stock, and everything else, the industry.

Q. Do you have an approved list of common stocks for investment by your pension funds?

A. Well, we have something we call a guidance list, and [fol. 2087] that is a better term for it. That is a guide that is gotten up once a month, and in effect says that our directors' committee on trust matters will, without much question, approve recommendations to purchase common stocks on that guidance list during the month in which it is in effect.

Q. Is that guidance list revised at regular intervals?

A. Yes, monthly.

Q. Each month?

A. Yes.

Q. Approximately how many common stocks will appear on such a guidance list?

A. It varies very widely depending on conditions of the market, but I should say 40 or 50 might be a fair figure.

Q. And the identity of those 40 or 50 would vary from month to month?

A. Oh, yes.

Q. Is the du Pont Company, for example, on the guidance list at this time?

A. No, sir.

Q. Is General Motors?

A. I am not sure whether General Motors is or not. I have been down in Florida, and whether they took it off or put it on, I am not sure. It has been on and off from time to time during the years.

Q. And du Pont at some time has been on the list, I take it?

A. Oh, yes. Yes. It hasn't been on for something over two years.

Q. Do all of the pension trusts that have investments in common stocks carry some part of their investment in each of the 40 or 50 on your guidance list?

A. Oh, no. No, certainly not. You see, those are the ones we are going to buy during that month. Now, if we have no funds in the trust, new funds coming in, that is, or if we have no securities we want to sell in the trust, we wouldn't have any occasion to buy. So, of course, there is [fol. 2088] no similarity in the accounts from that point of view. I mean, no exact similarity. There are some general similarities.

Q. Now, I believe you have testified that the Guaranty has 217 pension trusts?

A. That is right.

Q. By the way, Mr. Kunhardt, Exhibit 38 carries a heading, "Partial List of Corporations Whose Pension, Profit Sharing or Thrift Plan Trusts are Administered by Guaranty Trust Company."

Would you tell us, roughly, the significance of pension trusts in this list of companies?

A. They are almost all pension trusts, in one way or another. The profit sharing and thrift are of negligible importance. You see, that is put on by these new business fellows because they might be talking to someone about what he calls a thrift plan, and he wants to show that we have some thrift plans.

Q. But basically, the 217 are pension trusts?

A. To all intents and purposes, and are handled as such.

Q. You stated, I believe, twenty of your accounts carry no common stock?

A. That is right.

Q. Do the balance of your pension trusts own some amount of General Motors stock?

A. No. We only have General Motors stock in something around seventy accounts.

Q. I should like to read to you——

A. Let me revise that answer. I would rather make that answer 135 accounts. The reason I want to revise it is we have 65 accounts that own no common stock themselves, but own an interest in what we call a commingled pension fund—commingled fund restricted to common stocks. It is like an investment trust, but there is no extra charge for running it.

Therefore, indirectly these 65 of them do have an interest [fol. 2089] in General Motors, but don't own it directly themselves.

Q. Seventy of the pension trusts do own certain amounts of General Motors directly?

A. About 70, and 65 indirectly, so there are about 135.

Q. And the balance of the accounts own no General Motors directly or indirectly?

A. That is right.

Q. I should like to read to you the testimony that has previously been given in this case, at page 1085 of the transcript, by Dr. Roger Murray. This question was asked:

> "Q. Doctor Murray, along the same lines, have you made any estimates as to how much of these sums these pension funds—not the pension funds—these common stock purchases that you referred to above will be invested in the common stock of General Motors?
>
> "A. On the assumption, which I make with considerable confidence, that General Motors will maintain its leading position as a well-managed, profitable enterprise, I believe that we may expect the pension fund portfolio managers to put one and two-thirds per cent of their common stock money in the shares of General Motors stock."

Mr. Kunhardt, would you expect the Guaranty Trust Company would regularly invest in General Motors stock one and two-thirds per cent of the pension fund money invested by it in common stocks?

A. No.

Q. Would you expect the Guaranty Trust Company to invest any fixed percentage of pension fund money in General Motors stock?

A. No.

Q. Would you expect the Guaranty Company to invest any fixed portion of pension funds money in common stocks?

A. No.

[fol. 2090] Q. Would that proportion vary from time to time in your judgment?

A. Yes.

Q. Would it vary from pension trust to pension trust?

A. Yes.

Q. Would you expect a fixed percentage of the funds available for common stock investment in any particular pension trust to be invested in General Motors stock?

A. No.

Q. I wonder if you would state for us the basis of the conclusions that you have just expressed.

A. Well, you can easily figure out what has happened in the past, but to project that into the future would be very hazardous.

For example, the most popular, I think the most popular industry for investment since the war has been the oil industry. Now, we stopped buying oil stocks two years ago and haven't bought any.

Q. You haven't invested any of your pension trust funds in oil stocks?

A. Well, not on balance. Now, you could see what would happen if you use some figures as to what you have done for ten years and project it into the future. Actually it is completely stopped there.

The same, by the way, is true of chemical stocks. One of the reasons we haven't bought du Pont is that we stopped buying chemical stocks two years ago. We are very glad we did, too, by the way.

Q. In your opinion, would the amount of new common stock coming onto the market either from established companies or new companies enter into the judgment you have just expressed?

A. Well, it makes no difference if common stock comes into the market from the established companies except insofar as it might have an effect of making the stock more attractive due to decline in price.

[fol. 2091] New companies undoubtedly would be attractive on the quality, and it has been brought out recently, such as the Great Atlantic & Pacific Tea Company, and a little earlier Campbell Soup, we bought quite heavily in them, and to a smaller extent Champion Spark Plug, so as privately held companies, fine, yes, they would be other investment media that pension trusts might very well avail themselves of.

Q. Would you be prepared to state today any estimate as to any percentage of the pension funds invested in com-

mon stocks that would be invested over the next several years in any particular common stock?

A. No.

Q. Do you know whether there is agreement among pension fund portfolio managers as to the desirability and undesirability of particular common stock investments?

A. Well, I know there is no agreement, because that would be something like General Motors telling Ford what kind of a new car they were going to bring out next September.

We don't talk about those things. They are trade secrets. I do know, though, and I don't see why I shouldn't mention it, that, as you all know, Morgan and the Guaranty Trust Company are talking about consolidating. We have had some informal talks. I do know that the Morgan policy in selection of stocks is quite different from ours.

Q. Could you state, by an example, what you mean by that difference?

A. Well, for example, in recent years we have been buying the drug stocks, and Morgan hasn't bought any. I mention that because that is a favorite of the Guaranty Trust Company.

Q. Why is that?

A. Because the drug stocks have done extraordinarily well.

[fol. 2092] Q. And Morgan hadn't purchased drug stocks and you had in quantity?

A. That is right.

Q. Have you examined the proposed judgment which the Government has asked the Court to enter in this case?

A. Yes, sir.

Q. Are you generally familiar with the terms of that proposal?

A. Yes, sir.

Q. In the event, Mr. Kunhardt, that this Court were to adopt the Government's proposal, would the pension trusts which the Guaranty Trust Company administers be buyers of General Motors stock?

A. No, sir.

Q. At no price?

A. Oh, yes. Yes, at a price. Well, let's take the condition as it exists right today.

In order for the pension trusts to be buyers of stock of General Motors, it would have today to sell to produce an income of more than five per cent. That would be $40 a share, and we probably would be quite heavy buyers, if everything is the way it is today, at $38, which is 5¼ per cent.

Q. Well, until the stock were to drop to the price of 40 or 38, as you have testified, the pension trust would not be significant buyers of General Motors?

A. That is correct. You see,——

Q. Would you explain?

A. That would change the character of the investment.

Q. Would you explain that, please?

A. Surely.

In these pension funds you have various objectives of the creators of the trust, as I explained previously in discussing the matter of the percentage to be placed in common stocks.

Now, some of these people, and many of them, want to [fol. 2093] have a high income even from their common stock portfolio, and today common stock yields barely 3 per cent on an average.

So you have got to pull in the new buyers, or when you pull in the new buyers, because the stock changes its characteristics and becomes an income stock, at that point you have added purchases, at least the Guaranty Trust Company does; therefore, we would be buyers of General Motors for those accounts who want income at that level today.

Q. All right. That level is a yield of something over 5 per cent?

A. Yes—well, 5¼ we like to get.

Q. Five and a quarter? And assume——

A. But that can change tomorrow if the bond yield is increased.

Q. So that you might want even a higher yield?

A. A higher yield, yes. That might be.

Q. And taking the current dividend of $2 a share and the desirable five and a quarter per cent yield, that would mean that your investment trusts would come in and buy at thirty-eight to forty dollars?

A. That is right. That is in volume, of course. You always might buy a few shares and sell a few shares.

Mr. Gribbon: I have no further questions, your Honor.

Cross-examination.

By Mr. Andrews:

Q. Mr. Kunhardt, would you tell me, are all of these pension funds that you have on du Pont Exhibit 38, plus the additional ones that are not on this list, are these non-insured type pensions?

A. Oh, we are a trustee. We are not an insurance company.

Q. So they would be non-insured, is that right?

A. Oh, yes. They are trusteed pension funds, yes, surely.

[fol. 2694] Q. I think you stated that at the present time the du Pont stock is not on your list of stocks that you purchase for these pension funds, is that correct?

A. That is correct.

Q. I think you called it your guidance list, was it?

A. Yes.

Q. When was that stock—Has it been on that list in the past?

A. Oh, yes.

Q. When was it taken off?

A. 1957.

Q. Could you tell me the reasons why?

A. Yes. We did not like the outlook for the chemical industry.

Q. If the outlook improved for the chemical industries, would it be likely to go back on that list?

A. It might.

Q. I think you stated that twenty of your funds did not have any common stock at all in them, is that correct?

A. That is right.

Q. Could you tell me what the dollar amounts of the assets of those funds are?

A. No, I couldn't.

Q. Do you have an approximate idea?

A. No, I don't really.

Q. Are they larger——

A. I know of one that is twenty-five million that has no common stock in it.

Q. Would that be your largest one?

A. Oh, no.

Q. Would they be among your largest funds or your average funds?

A. I would not think so.

Q. You would not think so?

A. No.

Q. Generally do these pension funds invest in equities to a large extent?

A. Yes.

Q. Would you know what per cent that would be or what proportion would be in equities?

A. No, I do not have that average per cent at all. I am sorry, it varies.

[fol. 2095] Q. I see. Now, referring to your diversification policies, I think you said that—I think you said that you tried to diversify as to the total proportion that would be in equities in the first place and then as among industries and then within industries as among companies, is that correct?

A. That is correct.

Q. And was it also your testimony you had no fixed policies in this regard?

A. That is right.

Q. As to what proportions? When you said you had no fixed policies, were you referring to a particular year or time, or just what?

A. Well, they aren't fixed from year to year or month to month. They change.

Q. I see. Over a long period of time, would you have some particular policy, overall policy, as to diversification?

A. No, I don't think so.

Q. Is it possible by this last answer that over the years you may go out of equities altogether?

A. Yes. We have done it twice.

Q. You have gone out?

A. Twice, in 1929 and 1937, I am very glad to say.

Q. Could you trace for me briefly what has been the activities of the Guaranty Trust Company as far as changes over the years; how did they go from bonds to equities, and so forth? I mean, could you tell me the changes in the composition of your pension funds over the years, or could you go back——

A. Well——

Q. Oh, for the past ten years, perhaps?

A. Well, ten years isn't a very long time. As I just testified, we sold or recommended the sale of every stock we had in the bank during the summer of 1929. We did the same thing during the spring of 1937.

[fol. 2096] We were heavy sellers of—we sold down materially at one point in 1946. Those were the only general large sales programs that I remember we had.

Q. How long has your bank administered such trust funds as you have on this list? Would you know the approximate time?

A. Oh, I do not know exactly, but not to any material extent prior to the war.

Q. Prior to World War II, or subsequent to World War II? When you first went into pension funds, were you immediately purchasing equities, or——

A. No.

Q. What type of assets were you purchasing?

A. Fixed income-bearing securities.

Q. Has this policy now changed since that time so you are now more in equities than you were?

A. There has been a definite trend toward the inclusion of more equities.

Q. I see. Could you tell me what the changes have been since World War II in terms of percentages? Did you start out with no equities whatsoever after World War II? In other words, what per cent of equities did you have?

A. I don't remember. I do not remember that exact time.

Q. Was it a small amount?

A. Oh, yes.

Q. Could you tell me in your opinion why you have had this shift to equities?

A. Well, largely because our customers have been more anxious to obtain an interest in what they consider to be the growth of the country and have been fearful of inflation.

Q. Again referring back to your diversification policies as among industries, how many industries would you think had to be represented to have this diversification? Would having equities in three industries, for instance, be the required diversification?

A. Oh, no. That is not diversification. I should think you [fol. 2097] ought to have maybe twenty, and that is a very rough figure.

Q. Has the automobile industry always been one in which you have attempted to have equities?

A. No.

Q. Has this been one of the industries?

A. No.

Q. Well——

A. Let me correct that.

Q. Surely.

A. I may have misunderstood the question. We have always had some automobile stocks. We have not always bought or been active buyers of them, or actually been buyers on balance of them. I think that is the better answer.

Q. Have you always had a representation of the chemical industry in your portfolios?

A. Yes.

Q. At the present time do you have any other stock of automobile companies other than General Motors?

A. Yes.

Q. Could you tell me which ones?

A. We have a negligible amount of Ford, and a small amount of Chrysler.

Q. Is the bulk of the stock that you have, that is represented by the automobile industries, in General Motors?

A. That is right.

Q. Could you tell me, either in dollar amount or by proportion of your stock, of your stock that is now in du Pont stock in your portfolio?

A. How much stock we hold in pension funds?

Q. Yes.

A. I think it is 40,000 shares.

Q. I believe it was your testimony that if the Government decree was adopted that you would not—I think you stated you might take General Motors off your guidance list; was that your testimony, or did you say you would not purchase any more?

A. I said I did not know whether General Motors was on the guidance list at the present moment.

[fol. 2098] Q. Oh.

A. That was my testimony, but if it is on, we would take it off.

Q. I see. As to the du Pont stock that you now have in your portfolios, would you sell this stock in the event that

the Government decree were adopted, the present stock you now have of du Pont, that is?

A. No, I would rather not testify to that, if you don't insist.

Q. All right. I would ask the same question about the General Motors stock that you would receive as a result of the Government decree. The same question as to the General Motors stock that you would receive——

A. Oh, excuse me. I thought you meant what we would do with du Pont.

Q. What was my question?

A. I would rather not testify on that. I will, if you want me to; but I would rather not.

What we would do with the General Motors stock we received? Well, that is a different question.

Are you confining yourself to pension funds in that question?

Q. Yes, sir. I think your testimony was confined to that.

A. We would probably hold most of it. I think we probably would.

Q. You probably would?

A. We would probably hold most of it.

Q. Could you tell me, either in number of shares or dollar amounts the proportion of the stocks in your pension fund that is General Motors?

A. Yes, 157,000 shares.

Q. Now how do General Motors and du Pont compare as to other stocks in terms of the size of your holdings? Are they among your top stocks?

A. It depends on how broadly you want to express this [fol. 2099] word "top." They certainly aren't our largest holdings by any manner or means; they certainly are not our smallest holdings. They are a goodly size, but I wouldn't say that they were top stocks, no.

Q. Are the stocks that are among your largest holdings, are they blue chip stocks?

A. Yes.

Q. As to your guidance list, is it pretty well confined to blue chip stocks, if you have stocks of other companies?

A. That expression, "blue chip" is a little confusing. We have some stocks in the guidance list that would not, by some people be called "blue chips." We have some coal company stocks, for instance, because we are interested in

the coal industry—I mean we are optimistic about the coal industry.

We did have and still do have some drug stocks, and certainly some of those wouldn't be called "blue chips." We think they will be called blue chips someday, but they are not now.

Q. I see. Would it be a fair statement to say that generally the large proportion of stocks on your guidance list are blue chip stocks?

A. I think that would be a fair statement.

Q. Could you tell me what criteria you take into account on whether or not to put a stock on your guidance list, what factors are involved?

A. First of all, we have got to be optimistic about the industry, and then we have got to be satisfied that the company itself, engaged in this industry, that that stock is a reasonably attractive way to get into that industry.

Q. For instance, would the company's position within the industry be an important factor?

A. Oh, yes.

[fol. 2100] Q. Would the past earnings record of that company be an important factor?

A. Yes.

Q. Would its future prospects also be an important factor?

A. It would be a most important factor; and its financial position.

Q. If the company was a highly diversified one, rather than committed to one particular industry, would that also be a factor?

A. That would be an adverse factor. And I don't think you worded that question the way you meant it to be.

It would be a factor favorably, if it was a well integrated company. You said, "diversified."

Q. I meant diversified in the sense that it was engaged in all types of activities—not integrated.

A. Oh, you did?

Well, that would be against it.

Q. In view of your diversification policies that you have testified about, would that sort of provide some diversification by just one stock, merely?

A. No. We would much prefer to have a company that

was engaged in an industry, and perhaps diversified to a minor extent.

Taking General Motors, for example, 90 per cent of its business is in the automobile business or the truck business, and five per cent may be for the Government, or less; then little dribs and drabs in these things that we personally know a lot about, such as Frigidaires, Diesel locomotives, and so forth; but they are negligible. But take a company like Olin Mathieson, that is spread widely all over. That is against it.

Q. Would you tell me why?

A. Why? Because it would take a veritable genius to try and keep up with all of the various changes and all the various industries in which a widely diversified company such as that has to engage.

[fol. 2101] Q. What problem do you have there? Does this throw your diversification generally off? Or you are not sure?

A. One of the greatest factors that you didn't mention is management; and when you find something that is extremely difficult to manage, you have greater doubts as to the ability of management than you do where you have a company that is relatively simple to manage.

Q. I see. I think you probably have already answered this, but why then did you choose General Motors, say, over Ford or Chrysler, since it is a diversified company?

A. Well, of course it is well integrated. It is not diversified; it is well integrated. But the chief thing General Motors has got outside of great ability and, in all respects, it has got a magnificent sales organization—much, much better than anybody else has got.

Q. Do you have an opinion as to what the future prospects of General Motors are in the industry?

A. Yes.

Q. Would you tell us what that opinion is?

A. May I have the last two words of your question?

Q. Of which question?

Mr. Andrews: Read the question, please.

(Question read.)

By the Witness:

A. Yes. I see no reason why it shouldn't maintain its position.

By Mr. Andrews:

Q. I think you testified that you have no policies that a fixed percentage of your funds would be in General Motors or any other company, or I think even further, in any other industry.

A. That is right. I did so testify.

[fol. 2102] Q. Over the years, even though you had no fixed percentage, have you, as a practical matter—have your investments tended to follow the lines of any certain per cent for any certain industry?

A. No.

Q. Perhaps I missed this, but did you testify that you do have an upper limit of the total assets of your funds that would be in a particular company? Was that a five per cent figure?

A. I did not.

Q. You have no such limit?

A. I haven't suggested it, and I said we didn't have any such figure, no.

Q. If you started to get a very large proportion, or, say, ten per cent of your assets in one particular company, even though the company's future prospects were favorable and all of the criteria you applied to its stock would be in its favor, would this concern you?

A. It would.

Q. How high would the percentage have to be before you began to get concerned, in spite of the company's position?

A. When it gets around four or five per cent we start whittling away at it, in a pension fund. That would be very high. Of course, that would only occur due to a great appreciation price.

Q. What happens if an industry's outlook isn't quite so favorable as you now have regarded the chemical industries for the last two years? What do you do with the stocks you have in that particular industry? Do you sell them?

A. It depends on how adverse it is. In the case of the

chemical industry, we did sell certain chemical stocks, and actually our holdings of du Pont are down slightly.

Q. Do you generally do a lot of selling, in your pension funds?

A. Yes.

Q. Do you also tend to hang onto your stock for long [fol. 2103] periods of time? Are you apt to buy stock one year and sell it the next, for instance?

A. No, that is unusual. Sometimes we have had to do it because we were wrong; but I would think we would, as a general rule, hold a stock through a cycle or until some price situation developed or some supply situation developed that caused us to pull out of the industry or wished to reduce our interest in the industry.

Q. If over the years, if you studied or made a study of what percentage of your assets were in particular industries, would you find any definite pattern or trend, like would you find over the years that generally you had three per cent in the automobile industries or one per cent, or what ever it might be?

A. I don't believe so.

Q. You think it would vary?

A. It would vary quite sharply in some industries.

Q. Which are some of the industries?

A. The outstanding example would be the steel industry. That percentage has greatly increased since there has been some assurance given the public that there wouldn't be price-cutting and that the individuals who used to be so active in the steel industry have been supplanted by others who have not been quite so radical in their operations.

The drug industry has changed very rapidly as the price structure of the drug products have changed. You may remember that penicillin was very profitable, then became very unprofitable, and now, more recently, there are very many profitable drugs.

The utility industry has changed very markedly and is changing currently very markedly, due to the different atmosphere in which they can finance their expansion.

The automobile industry, of course, has changed quite markedly and may change quite markedly again, due to [fol. 2104] good years and bad years, foreign competition, ability or inability to make money on small cars and all the other things that go into the ability to make profits.

Q. Even assuming——

A. I would like to add one more thing.

The outstanding one of all is the railroad industry.

Q. Assuming that this litigation that is now going on was not present, would you have purchased General Motors stock at its present price?

A. That would depend on what our judgment develops to be with regard to the 1960 outlook.

Q. When would this judgment be made?

A. Well, we ought to have some pretty good guesses within the next few months, although they won't be assured guesses. But there is beginning to be some hope that 1960 may be a good year.

Q. I think you spoke about a five per cent yield.

A. I did.

Q. Would General Motors qualify under that criteria at the present price?

A. It would.

Oh, no—no, no. We think the dividend is fairly assured at $2.00, so five per cent would be 40.

Q. I will ask you the same question about du Pont.

Would you buy du Pont stock, even assuming that there was no litigation going on, as there is at the present time?

A. No. We haven't been buying chemical stocks. If we can get a change in the price structure of the chemical products, we might; but we haven't been buying any chemical stocks on balance for some years, for two years now, and probably wouldn't, whether this litigation was going on or not.

[fol. 2105] Q. I asked you earlier some questions as to whether you would sell your du Pont stock if the Government decree was proposed and you were reluctant to answer. I would like to ask just one question in that regard. Is the reason for your not wanting to answer that you have not made any decision in this regard at this time?

A. No.

Q. That is not the reason.

Q. Have you studied any of the other pension funds that exist in the country today?

A. No.

Q. You do not know what their policies are?

A. No.

Q. Have you read anything or been aware of what the growth of pension funds has been since 1950, sir?

A. Yes, and I also saw the testimony of the gentleman from the SEC.

Q. Mr. Natrella?

A. Yes, that is the gentleman's name, which surprised me.

Q. What was surprising about it?

A. The figures were so much higher than any I had seen before.

Q. I think Mr. Natrella testified as to what the growth has been in the past. Is that what you are referring to?

A. No. More particularly his estimate of the growth during the next five years.

Q. I see. Have you seen any other projections or studies in this regard?

A. No, I haven't.

Q. Have you ever seen any by Dearing of Brookings Institute?

A. No.

Q. You do not know how Mr. Natrella's estimates compare with others?

A. No.

Q. I think since you read Mr. Natrella's testimony, I would like to ask you a few questions about it, if I may.

I think Mr. Natrella testified at the present time, if I [fol. 2106] recall correctly, approximately 26 per cent of the pension fund assets are now in common stock, and he testified that by 1960 he would estimate that this would go up to 30 per cent, and by 1965 it would stay the same.

How would you regard those estimates? Would you have an opinion?

A. I don't see how he can possibly make an assured estimate of that sort.

Q. What are your reasons for saying that?

A. Well, at the moment we have a great vogue in favor of common stocks. We have common stock selling prices that are based, as someone has said, more by fancy, vogue and hope than on facts, figures and precedent, if I am quoting correctly.

You can run into a situation in due course where the inflation worries are less, where business isn't as good as it is today, and where the stock market declines in price.

All three of those things would cause the percentage in common stocks of pension funds to decline, rather than increase. I don't know whether they are going to happen or not.

Q. Of course, I think he took these factors into account, but what about past trends or past history of growth of pension funds and where they seem to be going? Is this any guide to what, perhaps, they would do?

A. I don't think the past is any guide to the future.

Q. No guide whatsoever?

A. Oh, somewhat. It gives you some ideas to talk about.

Q. Do you have any opinion whatsoever as to the future growth of pension funds and what their policies will be in regard to assets?

A. No, I don't.

Q. You have no opinion whatsoever?

A. No, I don't.

[fol. 2107] Q. Do you see an abrupt change in the policies of your bank as to any changes in the type of assets they will be purchasing in the future?

A. Abrupt? No, I don't see any abrupt change.

Q. As far as you can tell at present, they will continue as they are?

A. More or less the same.

Q. I think you testified that you have not studied other pension funds and their policies, but I would like to ask you one question in that regard. Perhaps you may know the answer.

Do pension funds generally tend to favor blue chip stocks?

A. I didn't understand. What was the word—participate?

Q. Are you aware that pension funds generally favor blue chip common stocks?

A. Well, again, it is the question of what is meant by blue chip. I would rather say that they certainly favor the higher quality type of stock.

Q. Could you tell us why this is? Do you have an opinion?

A. Why, certainly. They are in there as trustees, and I am now referring to trusteed plans, and they are not there to speculate. They are there to invest the money, and therefore they will purchase what might be called investment stocks rather than speculations. Certainly not to

invest in new and untried ventures, I believe, which is anathema to the trustees.

Q. In deciding which stocks to put on your guidance list, and even which stocks to purchase, do you compare these stocks with other stocks as to their yield, earnings, and so forth?

A. Yes, but the first step is the industry.

[fol. 2108] Q. The first step is the industry?

A. The comparison of industry outlooks, yes.

Q. As compared with other industries?

A. That is right, and then these studies within the industry, you see.

Q. I see. Are you aware of any concern being expressed by writers or other experts in the field as to the growth of pension funds?

A. I have expressed a good deal of concern myself and I presume others have, too.

Q. You have expressed concern?

A. Yes.

Q. In which way?

A. Taking an awful lot of money out of one generation.

Q. Would you elaborate on that answer, sir?

A. Well, let's take these figures. If you are going to take 50 billion dollars or some such thing—or I think it was 70 billion dollars, wasn't it?

Q. I think that was the estimate in 1960. That was both insured and non-insured pension funds.

A. Taking that out of the economy, and then turn around and reinvest it in the economy, in the way that things were going, largely in bonds, because there is a great scarcity of stocks, stocks haven't been issued the way they were in the past—the time will come, of course, when stocks will be issued the way they were in the past, when it becomes profitable for a company to issue stocks rather than bonds, such as the case in 1929. You are having a terrific upset in the whole financial community, and I think it is very disturbing—not today or tomorrow, but what happens? Where is the end of this thing?

Q. That was my next question. Has the growth thus far been a matter of concern? Has it grown so very fast?

Mr. Gribbon: I object to that question, your Honor. [fol. 2109] I think this is far beyond the scope of the direct

examination. We are not involved in an inquiry as to whether pension funds are good or bad things, politically or economically, and the witness hasn't testified as to that.

Mr. Andrews: I am laying a background for some questions I want to ask, your Honor. This witness has testified what he thought future purchases of pension funds would be——

Mr. Gribbon: He did not.

Mr. Andrews: On General Motors stock.

Mr. Gribbon: He testified only on what the pension trusts administered by the Guaranty Trust Company would do in the event the plan is approved.

The Court: Objection sustained.

By Mr. Andrews:

Q. Do I understand that you did not give any testimony as to what your future plans would be in purchases of General Motors stock? I mean, you just testified as to what your own trusts will do?

Mr. Gribbon: The record will speak for itself on that.

Mr. Andrews: If that is his testimony, of course, my question is outside the scope of the direct.

The Court: Objection is sustained.

Mr. Andrews: If he did make any predictions, I think I am entitled to ask the question.

By Mr. Andrews:

Q. In deciding whether to purchase General Motors stock or any other stock for that matter, do you estimate the prospects for extra dividends and the prospects of extra [fol. 2110] additional dividends to be given in future yields? Do you take that into account?

A. Oh, yes.

Q. That is a factor?

A. Certainly.

Mr. Andrews: I have no further questions.

The Court: Are there any other questions?

Mr. Gribbon: No further questions.

(Witness excused.)

The Court: The Court stands recessed for ten minutes.

(Whereupon a short recess was taken, after which the following further proceedings were had:)

The Court: Counsel may proceed.

Mr. Cox: The du Pont Company calls R. Russell Pippin. Mr. Pippin, will you take the stand?

If it please the Court, we have given the Clerk three exhibits that will be used in this examination.

The Court: I have them.

Mr. Cox: They are in the order in which they will be used.

R. Russell Pippin, a witness called on behalf of the defendant, E. I. du Pont de Nemours & Company, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Cox:

Q. You are R. Russell Pippin?

A. I am.

Q. And you are the treasurer of the du Pont Company?

A. That is right.

Q. How long have you been treasurer of the du Pont Company, Mr. Pippin?

A. Since 1953.

[fol. 2111] Q. Were you employed by the du Pont Company before that?

A. Yes.

Q. In what capacity?

A. For the six years immediately preceding that I was first assistant treasurer.

Q. And before that?

A. Before that I was assistant comptroller.

Q. How long have you been employed in the Treasurer's Department of du Pont?

A. Thirty-one years.

Q. Mr. Pippin, have you read the proposed judgment that has been filed by the Government in this case?

A. Yes, I have.

Q. Have you also read the proposed judgment that has been filed by the du Pont Company?

A. Yes.

Q. Mr. Pippin, what policy has the du Pont Company followed with respect—in the past, with respect to its use in the chemical business of the cash dividend which it receives from General Motors?

A. With the use in the chemical business of the cash received from General Motors?

Q. Yes.

A. It has not used the cash received from General Motors in the chemical business. It has always been the practice to pass the dividend received from General Motors on through to the stockholders of du Pont.

Q. Has the amount of the General Motors dividend been passed through in its entirety or less the deductions, Mr. Pippin?

A. Well, prior to 1936, at which time the intercorporate dividend was first imposed, it was passed through in its entirety. Since that time the amount of the GM dividend reduced by the dividend tax which we have to pay on it has been passed through.

Q. What policy, Mr. Pippin, has the du Pont Company followed with respect to the payment of dividends to its [fol. 2112] stockholders out of the earnings from the chemical business of the du Pont Company?

A. Well, the basis of the policy is to retain in the business for future expansion that part of the earnings from the chemical business calculated to be necessary for the healthy growth of the business.

The excess above that has been paid out in dividends. Over the course of some years now that has resulted in paying out about 68 per cent of the earnings from the chemical operations and retaining about 32 per cent.

Q. So that the total dividends over this period of time that you mentioned in your previous answer consisted of approximately 68 per cent of the earnings from the chemical business of the du Pont Company plus the cash equivalent to the dividend received from General Motors less the intercorporate dividend tax?

A. Yes, that is correct.

Mr. Cox: I should now like to have marked for identification a table headed, "Assumed Distribution of GM shares

in Lieu of Part or All Assumed Total du Pont Common Dividends of $6 Per Share Per Year."

This table should be marked du Pont Exhibit 39 for identification.

(Thereupon said exhibit was marked defendant du Pont Exhibit 39 for identification.)

By Mr. Cox:

Q. Mr. Pippin, do you have a copy of the table which has been marked du Pont Exhibit 39 before you?

A. Yes.

Q. Was this table prepared under your supervision and direction?

A. Yes.

Q. Are you satisfied that it is accurately prepared?

A. Yes.

[fol. 2113] Q. Can you tell us what the purpose of this table is, Mr. Pippin?

A. Well, the purpose of the table is to determine the amount of cash which would be accumulated in the company and at what rate and over what period of years that cash would be accumulated if some portion or all of the total du Pont dividend were paid by the distribution of GM stock.

This has been calculated, assuming various market prices for the GM stock, and also assuming various proportions of the $6 dividend used for this purpose that is paid in General Motors stock.

This schedule is divided into two parts.

Q. Before you describe the two parts, Mr. Pippin, may I ask you what assumptions were made in connection with the preparation of this table?

A. Well, the basic assumptions are tabulated here in a note on the right-hand side.

Q. In a box on the right-hand side?

A. That is right.

Q. Now, let me then direct your attention to Part I of the chart, which is the upper portion of the chart. Will you explain to us what the figures in that part of the table mean?

A. Well, let's look at Columns 2, 3 and 4 first, because Column 1 is the result of the Columns 2, 3, and 4. In

Column 2 it is assumed that 30 per cent of the $6 annual dividend, which is equivalent to $1.80, is paid by the distribution of the GM shares.

This would produce an annual accumulation of cash in the company of 82 million dollars. It would mean the distribution each year of 1,800,000 shares of General Motors if the General Motors is $45 a share, and in that condition it would require 34.4 years to complete the distribution.

[fol. 2114] In Column 1 at the $45 price, over whatever period of years it would take to complete the distribution at $45 a share, there would be backed up in the company a total of $2,835,000,000 of cash.

Q. At the end of the period?

A. At the end of the period. The rest of the upper part of the statement gives the same type of information but under different assumptions as to the market value of the General Motors and as to the rate of pay-outs.

Q. Let us, to be sure we understand that, direct your attention for a moment to the upper part of Column 4. Now that, if I read it correctly, assumes that 100 per cent of the $6 dividend of du Pont is paid in General Motors stock, is that correct?

A. That is right. Now, under that condition, the cash accumulation each year would be $274,000,000. It would result in a distribution of six million shares a year, and it would take 10.3 years to complete the distribution, assuming a $45 market price for the General Motors stock.

Q. And during that period of time the total cash accumulated would be $2,835,000,000.

A. $2,835,000,000 cash accumulation in the 10-year period.

Q. Now, let us direct our attention to Part II of the chart, which is in the lower half of the page, Mr. Pippin, and I will ask you to explain the figures that appear in Part II.

A. Well, under Part II we develop data with respect to the pay-out of the number of shares each year if we take a specified number of years in contrast to taking a proportion of the dividend.

For instance, in Column 2 we would pay out a total of 6,300,000 shares each year if the distribution were to be [fol. 2115] completed in ten years. With the market price

at $45 for General Motors stock, this would produce an accumulation each year of $284,000,000 of cash.

The dividend paid would be equivalent to $6.20 or would have a market value of $6.20, and this is 104 per cent of the basic assumption that we would be paying on a $6 dividend.

This operation again would result in the accumulation of $2,835,000,000 cash over the 10-year period.

Column 3 and Column 4 present the same type of data but assuming a 15-year period for distribution and a 20-year period for the distribution.

Q. The total cash accumulation figures in Column 1 are the same both in Part I and Part II of the table?

A. Yes, that is correct.

Q. Now, let me ask you this question about those figures, Mr. Pippin. Do they represent any accumulations from any source other than the cash saved in the payment of the dividend?

A. No.

Q. Do they include, for example, any accumulations that would be made by reason of retained earnings from the chemical branch of the business?

A. No. This would be on top of any retained from the chemical business.

Q. Do they include any accumulations of cash that would result from depreciation accrual.

A. No, no.

Q. Turning from du Pont Exhibit 39 for identification, Mr. Pippin, let me ask you whether you have at my request prepared a table which shows for a period in the past the sources of the funds which the du Pont has used for the expansion of its business?

A. Yes, we have prepared such a table:

[fol. 2116] Mr. Cox: I shall ask the reporter to mark this table as du Pont Exhibit for identification, 40.

(Thereupon said document was marked Defendant du Pont Exhibit No. 40 for identification.)

By Mr. Cox:

Q. You have a copy of du Pont Exhibit 40 for identification before you?

A. Yes, sir.

Q. Was this table prepared under your supervision and direction?

A. Yes.

Q. And are you satisfied that it is an accurate table?

A. I am.

Q. Would you explain to the Court, Mr. Pippin, what the table shows?

A. Well, this table shows the relationship between cash flow into the company from internal sources only during the 13 years since the end of World War II, set off against the amount of cash which has been required during the same period to expand the business through additions to plants, construction expenditures, together with the necessary working capital required to support that expanded plan.

The sources of funds used here, which are internally generated, are the depreciation accruals, which aggregated during this period $1,162,000.

Earnings retained from the chemical operations of the business aggregating $756,000,000, and cash conserved by the issuance of new common stock under the bonus plan totalling $103,000,000.

The cash derived from these three sources aggregated $2,022,000,000. During this corresponding period our construction expenditures totalled $1,767,000,000. The increase in net working capital, excluding cash, required to support the plan, was $232,000,000, a total outlay of just under two billion dollars.

[fol. 2117] This left an excess of internally generated cash receipts from these specific sources of about twenty-two million dollars in excess of the cash required over the 13-period.

Q. Mr. Pippin, I should like to ask you some questions about Columns 2, 3 and 4 of this chart, which sets forth the internal sources from which capital is obtained. Let me ask you first about Column 3, which is headed, "Retained Earnings."

Do those figures include anything except retained earnings from the chemical operations of the du Pont Company?

A. No, they are entirely from the income derived from the chemical operations.

Q. They do not include in any degree any income derived from the dividends on the General Motors stock?

A. No, they do not.

Q. I note that in Column 4, which is headed, "Proceeds From Sale of Bonus Stock," there are some years for which no figure appears. Why is that, Mr. Pippin?

A. In those years the Finance Committee directed that we purchase du Pont common stock and thereby expend company funds rather than issue the stock which has the effect of conserving cash, retaining cash in the business.

Q. I see. Mr. Pippin, in the course of your duties as Treasurer of the du Pont Company, have you made an estimate of the total capital requirements that the du Pont Company may have to meet for expansion purposes in the next ten years?

A. Yes.

Q. Can you tell us what the amount of that estimate is?

A. The estimate of the cash required to support the business?

Q. Yes.

A. Yes. To support the level of sales which we antici- [fol. 2118] pate ten years out, we calculate that cash for construction and added working capital will amount to about $2,500,000,000.00.

Q. Is that estimate based on an estimate that there will be an increase in the sales of the du Pont Company?

A. Yes, that anticipates that in ten years sales will have doubled over the current level, or they would have advanced from about 2 billion dollars annually to 4 billion dollars annually.

Q. Now, have you also made an estimate as to the sources from which this estimated capital requirement in the amount of $2,500,000,000.00 will be obtained?

A. Yes.

Q. Now, what is your estimate as to that?

A. Well, we estimate that from depreciation accruals and retained earnings from the chemical business, just those two sources will provide more cash than is required to support this expansion program.

The cash from these two sources would approximate 3 billion dollars in the next ten years, and the calculation of the cash required for the expansion of the business is approximately $2,500,000,000.00, so that we anticipate cash proceeds from only two sources which generate cash of 500 million dollars in excess of the requirement.

Q. In your estimate with respect to the sources, you have made no allowance for any capital obtained from sales of bonus stock, is that correct?

A. The ten-year period does include the year 1958; and in the year 1958, you could see from this statement that we have included $23 million. That is a source of cash that now is in back of us.

Over the course of the next nine years, in making these calculations, we assume that we would not issue any more [fol. 2119] stock for bonus purposes, and that therefore there would not be that source of cash. If we should issue stock for bonus purposes and derive the cash from that source, we would add to our cash inflow another 250 or 260 million dollars.

Q. But that is not included in the 3 billion dollar figure which you gave me?

A. No, it is not.

Q. Now based on these estimates, as to the next ten-year period, Mr. Pippin, to what extent did you anticipate that the du Pont Company will have to raise capital from outside sources, in this period?

A. Not at all.

Q. Let me now again direct your attention to the first exhibit we considered that has been marked du Pont Exhibit 39, for identification.

Let me direct your attention, first, Mr. Pippin, to the upper part of that table, Part 1, and to Column 1; and to the figure $2,835,000,000.00, which you see there in Column 1.

A. Yes.

Q. Now, as I understand your previous answers that you gave to us, that figure represents the amount of cash that would be accumulated by the du Pont Company, for example, in 10.3 years, if you assume a General Motors market price of $45.00 and a distribution of a $6.00 dividend by the du Pont Company entirely in the stock of General Motors.

Is my understanding correct on that?

A. Yes, it is.

Q. Then dropping down to Column 1, the next figure is $2,520,000,000.00, and again directing your attention to Column 4, that represents $2,520,000,000.00, and, as I understand it, it represents the amount of cash to be accumulated

in 9.2 years, if you assume a market price for General Motors of $40.00 and a distribution by du Pont of a $6.00 [fol. 2120] dividend of 100 per cent of General Motors stock?

A. That is right.

Q. And the figure remaining, the third figure in Column 1, which is 2,205,000,000 represents the same kind of a cash accumulation, based on the assumption that the market price of General Motors is $35?

A. That is right.

Q. And Column 4 shows the distribution period in that event would be eight years?

A. Yes.

Q. With those figures in this table before you, Mr. Pippin, I shall ask you this question.

Assuming that in the next ten years the du Pont Company should, in fact, accumulate $2,835,000,000, or the lesser amount, $2,520,000,000, or the lesser amount of $2,205,000,000, in your judgment could the du Pont Company in that period of time effectively use that amount of money in the expansion of its chemical business?

A. No. I see no prospect of it at all.

Q. Why do you say that, Mr. Pippin?

A. Well, the du Pont Company has never to my knowledge, been restricted in its ability to expand by virtue of a lack of funds. The general managers of the industrial departments do not even consider the factor of the availability of cash when they do their forward planning. The philosophy is and the instructions to the industrial departments are that the function of the operating department is to develop our chemical business. It is the function of the Finance Committee to provide the necessary capital.

The general managers make their projections and plans on the basis of commercial and manufacturing and their considerations are beyond the scope of cash; and the treasurer's department determines whether or not we can afford [fol. 2121] the expansion program. And experience shows that we have done it, with minor exceptions. And these projections or this estimate for the next ten years indicates that we can more than do it. So it just seems inconceivable that we could generate the use of twice as much cash as we are going to have from our own sources. This would contemplate an expansion of six billion dollars in ten years.

Q. How large, if you can tell us, in any general sense, is the du Pont Company in relation to other chemical companies in this country?

A. It is the largest chemical company in the world.

Q. So that if you should double the expansion that you plan on the basis of your ten-year projection, it would be an expansion that would involve capital expenditures of six million as opposed to, roughly six million—five million, as opposed to two million, five—or billion.

A. I am lost.

What did you say?

Q. I will put it another way.

What was your estimate as to the capital expenditures which you estimated would be required in the next ten years?

A. Two billion, five hundred million against a cash resource from internal sources of three billion.

Q. Mr. Pippin, assuming that this money could not be effectively used in the expansion of du Pont's chemical business, have you considered whether the du Pont Company could make effective use of accumulated capital in the amount shown on du Pont Exhibit 39 for identification in the next eight or ten years in some business other than the chemical business?

A. In some business other than the chemical business?

Q. Some industry other than the chemical industry.

[fol. 2122] A. Oh, I have done some general thinking about it. It seems like an unproductive field.

The du Pont Company is a chemical company; it is in the chemical industry. It has always been in the chemical industry. Its experience and skills are in that industry. I know of no expression of desire or wish on the part of the management to expand into other industrial fields, fields foreign to the chemical industry; so I see no reason to think that we would have any propensity to get into other lines of endeavor.

Q. Have you considered whether you could not buy some other kind of business enterprise that was not connected with the chemical business?

A. We have given that consideration from time to time; but, as I say, our experience and skills are in the chemical industry. If we should buy into businesses in the unrelated fields, we probably would be in trouble in terms of customer

relationships, supply relationships. There is nothing attractive about it.

I suppose, too, there are legal problems involved in that type of thing.

Q. Are you aware of any legal problems that are involved?

A. Am I aware of what?

Q. I say, are you aware of any legal problems that would be involved in the acquisition of other industries?

A. Well, I am aware of the fact that the lawyers are always cautioning us that we have major problems in terms of acquiring any other companies.

Q. Whether it is companies in the chemical industry or in some other industry?

A. That is correct.

Q. Mr. Pippin, have you ever considered whether this [fol. 2123] capital accumulated in the amounts shown on du Pont Exhibit 39 for identification, and over the periods of time indicated in that exhibit, could be used by the du Pont Company to invest in a diversified portfolio of securities of other companies?

A. I think that makes a kind of fantastic picture. I go back to the fact that we are chemists, with our experience and skills in that industry.

Now we are talking here about two billion, eight hundred million dollars. My recollection is that the largest investment trust in the country today is the Massachusetts Investors Trust, and I think they have assets of about a billion and a half, so the contemplation of du Pont organizing a branch of its business to invest this money in a portfolio would make du Pont not only the largest chemical company in the world but also the largest investment trust in the world. It would be twice as large as Massachusetts Investors Trust.

Q. Do you not find that prospect attractive, Mr. Pippin?

A. No, I don't find it attractive. We bought some securities one time, and we are here today.

Q. Let me turn now to another subject.

There has been some reference in this case to the possibility of distributing the General Motors stock owned by du Pont Company in one single operation and at one time.

Have you, at my request, made an arithmetical computation to indicate the tax consequences to the du Pont share-

holders in the event that all of the GM stock owned by du Pont should be distributed as a dividend in a single year?

A. Yes, we have made such a calculation, which has to include certain assumptions. It should not be interpreted as an exact figure.

Mr. Cox: I will ask the reporter to mark this computation as du Pont Exhibtit 41 for identification.

[fol. 2124] (Thereupon said exhibit was marked du Pont Exhibit 41 for identification.)

Mr. Cox: This, may it please the Court, is the third of the exhibits that we have had this morning.

By Mr. Cox:

Q. This table is headed, "Estimated Amount of Distribution to be Treated as a Dividend, Corporate as Against Non-corporate Shareholders of du Pont, Assuming 63 Million GM Shares are Paid Out in a Single Distribution."

Was this chart or table prepared under your supervision and direction?

A. Yes.

Q. Are you satisfied that it was accurately prepared?

A. Yes.

Q. With the table before you, Mr. Pippin, will you explain to us the nature of this computation?

A. Yes. Under the Internal Revenue Code, if the value of the distribution as a dividend exceeds the distributor's accumulated earnings and profits, as defined by the Code, the taxable income is limited to the amount of the payor's undistributed profits, accumulated profits; so if the 63 million shares were paid out at one time, the value of the distribution would exceed du Pont's accumulated earnings and profits. This creates a problem as to how to allocate this taxable base between the two categories of stockholders, namely corporate stockholders on the one hand, and non-corporate or individual, on the other, who are taxed, as you will recall, under different concepts.

According to the ruling of the Commissioner of Internal Revenue in this case that Mr. Dallstream got, the calculation is made along these lines.

[fol. 2125] The number of shares of GM stock that would be received by corporate holders is multiplied by the $2.09 tax basis of these shares in du Pont's hands, to determine

the value of the distribution to the corporate stockholders.

This shows that an estimated 24 million shares would go to the corporate stockholders. The product of that times $2.09 is $50,650,000.00, the value of the distribution to the corporate stockholders.

Similarly the shares that are distributed to the non-corporate stockholders for purposes of determining the valuation are multiplied by the market price of GM shares at the time of the receipt. For this purpose we have assumed the market price to be $45.00.

We also estimate that 38,700,000 shares of General Motors stock would be distributed to the individual stockholders. Consequently, the value of the distribution would be $1,743,000,000.00 to that category of holders.

This gives a total value of distribution, a concept under the law—not a fair market value, a concept under the law—of $1,793,000,000.00.

Du Pont's accumulated earnings and profits are estimated to be $1,100,000,000.00, so that that as the percentage of the total distribution, 61.34 per cent is a limitation on the taxable income.

Having derived the 61.34 per cent, it is then applied against the value of the distribution according to the two categories of stockholders. This produces, in the case of corporate stockholders, $31 million taxable dividends or $1.28 per share, which would be taxed at the inter-corporate dividend rate of 7.8 per cent.

In the case of the individuals, the 61.34 per cent of the value of the distribution would produce a taxable dividend [fol. 2126] to them of $1,069,000,000.00, or a taxable value from each share of GM of $27.60.

Now, the excess of the market value of the stock, $45.00 in this case, over the $27.60, which appears to be $17.40, would be applied to reduce the tax basis of the du Pont shares in the hands of the shareholders. If this should completely eliminate the tax base, there would be an immediate capital gains for such excess at the 25 per cent rate.

Mr. Cox: You may inquire.

Cross-examination.

By Mr. Reycraft:

Q. Mr. Pippin, referring to du Pont Exhibit No. 41,——

Mr. Cox: Your Honor, I would like to offer these three exhibits now in evidence.

The Court: Are there any objections?

Mr. Reycraft: I have no objection.

The Court: They may all be received.

(Said documents, so offered and received in evidence, were marked Defendant du Pont Exhibits Nos. 39, 40 and 41.)

By Mr. Reycraft:

Q. I have not objected to du Pont Exhibiti 41, but I would like to ask you, Mr. Pippin, a few questions which I think are required to clarify some of the language used.

Will you refer to Line 4 of du Pont Exhibit No. 41. The words value of distribution with respect to corporate stockholders, you assign the figure $50,650,000. Now, how do you define value in that context?

A. Well, I think I said in my testimony, Mr. Reycraft, that this is a concept under the tax law. It is not market value.

[fol. 2127] Q. It does not relate to market value?

A. No, it does not.

Q. Do you have any idea as to what the market value would be of the 24,272,000 shares we are referring to here?

A. You mean per share?

Q. No, the total market value of the 24,272,000 shares.

A. No, I have not.

Q. I compute it would be approximately $1,529,000,000, and I believe Line 6 shows the tax due on this distribution would be $31,000,000, is that correct?

A. The tax due?

Q. Yes, sir.

A. No. That is the taxable amount of the dividend. The tax due would be 7.8 per cent of that.

Q. Yes, you are correct. The taxable amount of distribution which would have a market value of $1,529,000,000 would be $31,000,000, I believe.

A. That is right.

Q. Now, going over further on Line 4, under the column headed "Total," you have a total of $1,793,409,000. I believe that again you have defined value in that context to be tax value. That is not market value. Am I correct?

A. That is right. That is a statutory concept.

Q. Once again, I compute the market value to be $2,835,000,000, at a market value of $45 for the General Motors shares?

A. Yes.

Q. I also compute—check me, if you will—that of this market value of $2,835,000,000, approximately 60 per cent of it under your computation would not be subject to income tax?

A. No. 60 per cent of it would be subject to income tax.

Q. 60 per cent of $1,793,000,000?

A. The factor——

Q. (Continuing) 60 per cent of $2,835,000,000, taking the market value rather than the tax value?

A. I beg your pardon, yes.

[fol. 2128] Q. Would not be subject to income tax?

A. Yes.

Q. Then what was your testimony, sir, with respect to the time at which such capital gains tax payable would be due?

A. I said that with respect to the individuals, the $17.40 per share excess represented by the excess of the $45 over the taxable amount of $27.60, that difference would serve first to reduce the tax cost of their du Pont shares. If their tax cost to the du Pont shares was less than $17.60——

Q. However, there are tax laws——

Mr. Cox: Let him finish.

By the Witness:

A. (Continuing)—such excess would then be taxable immediately at 25 per cent as a capital gain.

Q. That would only become a capital gains tax due if the taxpayer's cost was below $17.60, am I correct?

A. At the time of the distribution?

Q. Yes, sir.

A. Now, since the $17.40 serves to reduce his tax cost, then he stands to have that much more capital gain some

time in the future when he distributes or when he sells those shares.

Q. He would have a reduced basis, would he not?

A. That is right.

Q. He would have no requirement to pay a tax at the time he received a distribution to the extent that exceeded $17.40?

A. That is right.

Q. To the extent that the base exceeded $17.40?

A. It would be a deferment of his tax under that situation.

Q. If he should have to pay a tax, assuming he paid $10 for the share of du Pont stock, now worth $225, he would [fol. 2129] be paying a tax of 25 per cent of the difference between $10 and $17.40, is that correct?

A. That is right, and then when he finally sold that share, it would have no base and he would pay 25 per cent of whatever proceeds he got from it.

Q. Yes, I think we understand each other.

Now, do I understand your testimony to be that over the next ten years du Pont does not anticipate that it will do any outside financing?

A. We foresee no occasion for it now.

Q. Is the du Pont Company engaged in any aspect of the atomic energy industry?

A. Not as a commercial venture. It operates under a Government contract the Savannah River Plant, but it has no commercial activities in the atomic energy field.

Q. Do you anticipate there will be any commercial activity in the atomic energy field by the du Pont Company?

A. I don't. However, I have limited knowledge on that type of thing. I am in the finance end of the business.

Q. Should there be any, you haven't taken any into consideration in projecting your capital requirements which you estimated, is that correct?

A. If there is any, it would be reflected in the figures which are the starting point of our calculation of capital required, so the answer would be if it is anticipated in the next ten years, the cost of it has been provided for.

Q. If it is now anticipated that during the next ten years there will be a requirement, it is reflected in these figures?

A. That is right.

Q. But if the requirement arises two years from now, you would have no way of knowing what your capital requirements would be, is that true?

A. No; no.

[fol. 2130] Q. I understand your answer to be that you don't know whether there is any requirement included in your present figures because you are in the financial end of the business, is that correct?

A. I am confident that there is not.

Q. You are confident that there is not?

A. That is right.

Mr. Reycraft: I haven't anything further.

Mr. Cox: Just a minute.

Redirect examination.

By Mr. Cox:

Q. Mr. Pippin, do you know whether in preparing the estimates that led to the projected estimate as to the capital requirements of the company in the next ten years, the various departments which were concerned with those estimates, did take into account the question of whether there seemed to be any prospect for entry into or development in the atomic energy industry, as far as the du Pont Company is concerned?

A. Yes.

Q. They did?

A. Yes, they did.

Q. You mentioned some atomic energy enterprise in which the company is now engaged. What is that?

A. Yes. We have built and we do operate for the Atomic Energy Commission the so-called Savannah River Works of the Atomic Energy Commission. That is under a contract for which we get a fee of $1.00.

Q. A fee of $1.00?

A. A fee of $1.00.

Mr. Cox: Thank you. That is all.

Recross-examination.

By Mr. Reycraft:

Q. I assume that the competence which is being acquired now in the atomic energy field may some day have [fol. 2131] commercial application?

A. You m[illegible]n in the case of the du Pont Company?

Q. Yes, sir.

A. Oh, I suppose potentially it has that possibility.

The Court: Any other questions?

Mr. Cox: Just a moment. One more question.

Redirect Examination.

By Mr. Cox:

Q. So far as you know, based on what you did in the estimates, does the du Pont Company have any reason to believe that in the next ten years there is any reasonable prospect of using the 2 billion capital, in addition to capital generated in turn, which would be in the amount of, say, $2 billion in any commercial development of atomic energy? Do you have any reasonable basis for expecting that, Mr. Pippin?

A. I am not sure I understand that question.

Mr. Cox: Read the question, please.

(Question read.)

By the Witness:

A. No, we do not. I do not.

Recross-examination.

By Mr. Reycraft:

Q. You don't have any basis on which to form a judgment on that, do you, Mr. Pippin?

A. I have this basis. The matter of the du Pont Company's entry into commercial development or aspects of atomic energy industry has been considered by the Executive Committee, and the decision has been made not to enter into it.

Q. At this time?

A. At this time.

Q. You don't know what they will do the next year or [fol. 2132] the year after, of course?

A. I cannot be certain, of course not.

Redirect Examination.

By Mr. Cox:

Q. I take it, Mr. Pippin, the decision has also been made that there doesn't seem to be any reasonable expectation of spending capital in these amounts on atomic energy in the next ten years?

A. I am quite sure not.

Redirect Examination.

By Mr. Reycraft:

Q. Do you know that such a decision has been made?

A. Let's hear that again.

Mr. Reycraft: I think you should hear Mr. Cox's question.

The Witness: I should like to hear it.

(Record read.)

By the Witness:

A. The answer is what I said it was, yes.

By Mr. Reycraft:

Q. A decision has been made?

A. I told you what decision had been taken. The decision, the matter of the entry into the atomic energy field has been considered, and at least for the time being it has been decided we would not enter the field.

If that is a proper premise, then it follows that there is no expectation of putting any part of this 2½ billion dollars into the atomic energy field.

Q. That is the inference you draw from the decision with respect to going into the commercial application?

[fol. 2133] A. It can't be anything else, Mr. Reycraft.

Q. I am not trying to confuse you, Mr. Pippin, but do I understand that no decision has been made at the present time with respect to the use of the capital in the atomic energy field?

A. Decision has been made that at least at the present time we are not going to enter into the atomic energy field.

Therefore, it follows that there would be no capital required for that.

Q. That is the conclusion you draw from the commercial decision?

A. It is an inevitable conclusion.

Mr. Reycraft: That is all.

Mr. Cox: I have no further questions.

The Court: You are excused.

(Witness excused.)

Mr. Cox: At this point, may it please the Court, we should like to read the deposition of Mr. Ralph Lowell. He was leaving the country, and we took his deposition in Boston for the purpose of preserving his testimony and having it read before the Court.

Mr. Horsky took this deposition, so I think we will allow Mr. Horsky to impersonate himself. I will ask Mr. Scott, who has a good, strong voice, to impersonate Mr. Lowell.

Mr. Horsky: Do you wish to have a copy of it, your Honor?

The Court: No, I do not.

RALPH LOWELL, having been duly sworn, testified as follows in answer to direct interrogatories by Mr. Horsky:

"Q. Mr. Lowell, it is my understanding that you are about to leave on a rather extended trip, is that correct?

A. That is correct.

Q. Where will you be going, and for how long——"

[fol. 2134] The Court: What is his first name?

Mr. Horsky: Ralph Lowell.

The Court: You may proceed.

"Q. It is my understanding that you are about to leave on a rather extended trip, is that correct?

A. That is correct.

Q. Where will you be going, and for how long?

A. Well, we're sailing on February 12th on a cruise ship that spots a little bit of Africa—around the Mediterranean; due back April 13th.

Q. Will you assure Mr. Reycraft that the du Pont Company did not put you up to this trip?

A. That was arranged long before.

Q. Mr. Lowell, I think you have before you a copy of a document entitled, 'Biographical data of Ralph Lowell.' You have examined it before, and will you say whether it is correct."

Mr. Horsky: I will ask the reporter to mark this document as du Pont Exhibit No. 42, for identification.

(Thereupon said document was marked Defendant du Pont Exhibit No. 42 for identification.)

"Q. For the record, Mr. Lowell, would you mind going through this briefly with me? Would you explain the nature of your positions that are listed in that section on the first page entitled, 'Biographical'; that is, what was your position at these various companies?

A. You mean starting with the John Hancock Mutual Life?

Q. No, starting with Curtis and Sanger in 1913.

A. Oh, Curtis and Sanger, as you know, were brokers, mainly note brokers, and I came to work for them on coming out of college, after a trip around the world. I [fol. 2135] was just a salesman there.

Then in 1916 I went to the First National Bank as secretary to the then President, Daniel J. Wing. I left there to go into the Army during the First World War, and returned to Lee Higginson in 1919, where I was until 1932, and was a partner from 1929 on; then went with Clark, Dodge, when Lee Higginson liquidated. I went with Clark, Dodge and became a partner there until I left to go to the Boston Safe Deposit and Trust Company as originally Chairman and then President, where I now am President.

Q. And you are at present President of——

A. That is right.

Q. —Boston Safe Deposit and Trust Company.

Looking down at the other positions, sir, how long have you been, if you can recall, a member of the Finance Committee of John Hancock?

A. Well, when I became a director of John Hancock, for two or three years I was an alternate on their Finance Committee and then elected to the Finance Committee. I should think the Finance Committee would be probably around '48, '49.

Q. I see.

A. I now am the senior member of the Finance Committee aside from the two officers of the company, the

chairman and the president.

Q. Do you recall how long you have held the next two positions that are listed there, sir, with the Massachusetts Investors Trust and Massachusetts Investors Growth Stock Fund?

A. Well, approximately the same date as the Massachusetts Investors Trust—Massachusetts Investors Growth Stock Fund is a little younger than the main fund, but I have been on that at the same time that it was changed to the Growth Stock Fund.

[fol. 2136] Q. Since their origin?

A. Since the origin as a growth stock fund. They were called a second fund before that.

Q. Now, you are at the present time president of Boston Clearing House?

A. That's right.

Q. Are these banks that are listed, sir, the other banks other than the Safe Deposit and Trust Company with which you are connected?

A. I didn't understand your question.

Q. Are these all of the banking institutions that I have listed here with which you have had connection, Provident Institution for Savings—of which I understand you have been a trustee?

A. That is right.

Q. And two savings banks, Suffolk-Franklin and Dedham Institution for Savings, of which you are a member of the corporation, is that right?

A. That is correct.

Q. Could you tell us very briefly what the Lowell Institute is?

A. The Lowell Institute was established in 1837 by a collateral uncle of mine who had a rather sad life in the last two years—he lost his wife and two daughters with scarlet fever—and he started around the world and when he got to France, he studied the Ecole de Paris system there, and decided that he would like to do something for the people of Boston, because, as he put it, the soil of New England is so sterile that they are at a disadvantage, and he left half of his fortune to establish the Lowell Institute to give free public lectures for the citizens of Boston. At that time the amount was $250,000, and it was the second largest sum—there was one in Philadelphia before

that I think—the second largest sum that had been left for adult education of that size.

He also put a provision in his will that ten per cent of income should be added to principal each year so that the [fol. 2137] fund might keep up with the development of the country, that none of it should be invested in bricks and mortar, and that there should only be one trustee of the name Lowell, descended from a common grandfather, and I am only the fourth trustee since 1837. Before me was President Lowell of Harvard, and then his father, and then our common grandfather.

Q. You are a corporation sole by the laws of Massachusetts?

A. In 1918, when they changed the laws in this state, we had to get a law through making the corporation sole so as to preserve the tax-exempt feature of the educational Lowell Institute. The only other ones in Massachusetts, as you know, are the Catholic Division. They have a bishop or archbishop, as we have now—I think there are five of those and one of me.

Q. You are listed as connected with three institutions of higher learning, sir: MIT, Boston University, and Harvard. Do you have a financial position at any of those; that is, are you connected with the financial affairs of any of those institutions?

A. Well, strangely enough, next Friday I go to lunch with the Finance Committee of the Massachusetts Institute of Technology, simply as a visitor.

Boston University, I am head of their Finance Committee. Harvard University has a strange—they are unique in that the Treasurer has the full control of the investments and has no committee to advise him.

Q. Well, let me turn now to your position, sir. Let me turn to your position as President of the Boston Safe Deposit and Trust Company. Would you describe very briefly the nature of that institution, Mr. Lowell?

A. Well, the Boston Safe Deposit and Trust Company is primarily a fiduciary institution. We are not a commercial [fol. 2138] bank. We have a banking side but no one has a credit or right for renewal of a loan in the Boston Safe Deposit and Trust, which distinguishes us as a non-commercial bank. Our business is the handling of trusts, agency accounts, and things like that.

Q. Is it typical of that kind of business, personal trust business?

A. Is it——

Q. Does it do a typical business in that respect?

A. Oh, yes, yes.

Q. How old is the institution, sir?

A. There was quite a discussion here in Boston because—the Boston Safe Deposit and Trust Company and the New England Trust Company took out their charters at the same time. Ours antedates the New England by three months, but then they carried it around in their pocket for three years, and the New England Trust Company came in a little bit before us, but we are the second oldest trust company, and if you take it from that date, we are 75 years old, or if you take it from the time we actually went in, we are about 72 years old.

Q. How does it compare in size with other similar institutions here?

A. We are the second largest in New England. The Old Colony Trust Company, which is owned by the First National Bank, is the largest, but we are the largest independent trust company; and although we are a small bank, we are a very large institution, a little over a billion dollars.

Q. A little over what, sir?

A. A billion dollars of trust and agencies in our small banking side.

Q. That is the total of the amounts which you administer?

A. That is right. It is $1,187,000,000, if you want to get it.

[fol 2139] Q. Can you approximate about how many trusts that is, separate accounts?

A. I think it is 4,400.

Q. Do you have a common trust fund, Mr. Lowell?

A. We do.

Q. What is the purpose of the common trust fund, in a very brief statement?

A. The purpose of the common trust fund is to enable banks and fiduciaries to combine small trusts for the benefit not only of the trusts themselves and the beneficiaries by giving them wider distribution, but also to enable the companies to handle those small trusts without losing money. It is all protected by Federal law.

Q. Yes. About how large is the common trust fund now, do you remember?

A. It is a little over 56 million.

Q. Now in the trust company, sir, how are the decisions on investment policy, what to buy, what to sell and when to do it, made?

A. They all come before our Executive Committee. We meet once a week, on Wednesdays. Recommendations come through our investment analysis department and come up to the board, to the Executive Committee and are passed by the Executive Committee.

Q. And your position in that respect is as chairman of the Executive Committee?

A. Chairman of the Executive Committee.

Q. So you participate in all of the decisions?

A. That is right.

Q. Is that equally true of the common trust fund as well as of the personal, individual trust?

A. A common trust fund has to come before the Executive Committee every three months for action thereon.

Q. A complete review of its holdings, you mean?

A. A complete review of its holdings. Of course, it may [fol. 2140] come more often than that if there are any purchases or sales recommended, but we have to do it every three months because we have a going-in and coming-out date every three months."

The Court: Court will recess.

(Thereupon a recess was taken in the trial of the above-entitled cause until two o'clock, p.m. of the same day.)

[fol. 2141] Before Hon. Walter J. LaBuy, Tuesday, March 24, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.

Present: Same as before.

The Court: Proceed, please.

Mr. Horsky: Would you mark this as du Pont Exhibit 43, for identification?

(Whereupon said document was marked Defendant du Pont Exhibit 43, for identification.)

RALPH LOWELL, having been duly sworn, testified as follows in answer to direct interrogatories by Mr. Horsky:

"Q. Mr. Lowell, I've handed to you a copy of a document which is now identified as Lowell Exhibit 2, which purports to state the holdings in trust or executor accounts of the common stock of du Pont and General Motors as of last November 19th. Will you state whether this was prepared under your supervision, and whether it is correct?

A. It was prepared under my supervision, and is correct.

Q. Now, Mr. Lowell, I should like to ask you some hypothetical questions, and I will have to ask you to assume certain facts in connection with these questions as I go along. We will have to change the assumptions from time to time, but if at any time you are unclear as to which set [fol. 2142] of assumptions I am using at the moment, please inquire so we can be sure that we are talking about the same things.

You have before you a copy of the plan which was proposed by the Department of Justice in this case, have you not?

A. I have, sir.

Q. And you have read it?

A. I have.

Q. Now, in answering the next series of questions I should like to have you assume that the Court has decided to approve that plan, and I also ask you to assume in connection with this first set of questions that I will ask you that du Pont, in carrying out that judgment, has decided to make the ten payments of stock to its stockholders, which is called for by that judgment, in addition to its regular cash dividends.

Now, taking those assumptions for the moment, I would like to ask you, first, would the Safe Deposit Company continue to hold the du Pont stock which it now has in these several trusts as indicated in Lowell Exhibit 2?

A. Well, I can't answer that categorically, because we have different types of trusts, depending on——

Q. Let's take the first on personal trusts as distinquished from charitable trusts.

A. There, again, you have an instrument that might, on a few trusts, comparatively few trusts, allow you to take the distribution and count it as principal, but in most of

our trusts here in Massachusetts such a distribution will have to be taken as income, and because of that, and what we believe, does not fulfill the maker's idea.

We would sell the du Pont before such a distribution was made.

[fol. 2143] Q. Well, would you explain that a little more clearly. First let me ask you to distinguish more clearly between the two kinds of personal trusts. The first one is those where you have complete discretion as to how to allocate receipts.

A. That's the minority, and very much a minority.

Q. Now, what is the other type?

A. The great majority of the trusts are the ordinary trusts that we have where we do not have the right to distinguish between principal and income on a distribution of the stock.

Q. And in those trusts the Massachusetts law requires a certain course of conduct, you say?

A. Massachusetts law requires that we treat such stock as income.

Q. That is, stock distributed by du Pont, General Motors stock as distinguished from du Pont stock——

A. We would have to take it as income.

Q. Now, you say that you believe that type of distribution would be contrary to the settlor's intent. Would you explain that a bit more, please?

A. Well, with very, very few exceptions, that type of trust does not allow the beneficiary to take principal from the trust. We would consider this distribution as principal, but under the Massachusetts law we have to take it as income; therefore, we believe it's an invasion of the principal of the trust and an unfair allocation to the living beneficiary as against the ultimate beneficiary.

Q. And you would therefore do what to avoid that problem?

A. We would sell du Pont because it would lead to the possibility of unlimited litigation against us if we took principal under the Massachusetts law.

[fol. 2144] Q. Would the tax consequences of the sale have any bearing on your judgment in that respect?

A. Generally speaking, no; but there are cases where du Pont's cost is such a small amount of the trust that it might be, despite everything else, it might be we'd have to hold the

du Pont from the tax angle. That is a very small amount.

Q. Now suppose we turn from the personal trusts to the charitable trusts, what would be your attitude towards either holding or selling the du Pont stock in those trusts?

A. That is even clearer than the first category, because they all fall into one category; and we would sell du Pont stock, because the charity trusts again do not allow for the invasion of principal; and in our State—and I imagine in most States—we are supposed to, in a charity trust, distribute the income each year to charity; and, under the Massachusetts law, we would have to take it as income, so we'll sell du Pont so as not to invade the principal of the charity trusts.

Q. Have you had any prior experience with situations in which you sold stocks in order to avoid problems of this sort?

A. Yes, we had one—Standard of New Jersey.

If you will remember, Standard of New Jersey at one time paid part of their dividend in their own stock and, because of these conditions I have been referring to, we sold our Standard of New Jersey out of our common trust fund and wrote the company why we had done it, pointing out to them that we thought it was a hardship for fiduciaries in New England. They changed their plan. I think they made two distributions, then gave it up, and were kind enough to write back that we and others from here were responsible for that decision.

Q. Now, let me turn to the other side of the coin. [fol. 2145] Would there be any among your trusts, either personal or charitable, for which you would become purchasers of du Pont stock under the assumptions we are now making?

A. We would not become purchasers of du Pont stock for the purpose of getting the General Motors distribution—

Q. No. I am simply asking you, sir,—you have told me that certain of the trusts would be sellers of du Pont.

A. That is right.

Q. Would there be any trusts that would be buyers of du Pont?

A. In the category where we had the full say, the allocation of General Motors between income and principal, we might buy du Pont, if du Pont on its own earnings against

the General Motors earnings warranted us to buy it from yield, and general feeling of the value of the company.

Q. Would you be prepared to recommend du Pont for purchase by charitable trusts under this set of assumptions?

A. We would not do that until the distribution was finished.

Q. Still maintaining our same assumptions, Mr. Lowell, let me turn to the General Motors side of the picture. There are a great many trusts in the bank which have General Motors holdings as well. Let me make one further assumption which is necessary because of what you said.

Let me assume that there is some du Pont stock still in your trusts, notwithstanding your intention to sell most of it, so that you will have some distribution of General Motors shares coming to you on the du Pont stock which you hold under this plan.

Would that stock be held by the Trust Company or would it be sold?

A. This is in the case of trusts where we have the full allocation between principal and income?

[fol. 2146] Q. Well, it's in the case of any trust where you do not sell du Pont stock, for whatever reasons you have outlined earlier.

A. Well, in those trusts we would add it to the principal, and whether we held it or not would depend on the size of the General Motors holdings we had in the trust at that time.

Q. Now, Mr. Lowell, in the case of a trust in which you would have to treat it as income, but which you nevertheless decide for whatever reasons to hold the du Pont stock, would it be likely to be held or would it be likely to be sold when it was received?

A. It would more likely be sold.

Q. What about any charitable trusts which continued to hold some du Pont for whatever reason and received General Motors shares by way of this distribution under the plan? Would the charitable trusts be likely to hold the General Motors shares or sell it?

A. Well, I've said that we would sell the du Pont in the charitable trusts.

Q. Well, I'm asking you to assume that in some of your charitable trusts for some reason there remains some du Pont stock.

A. If we had a charitable trust where we could allocate it to principal, then it would again be a question of whether the current holdings of General Motors were in line or out of line, and I can't say definitely whether we'd—the tendency would be to hold it if we didn't have too much General Motors.

Q. Now under the same circumstances, would any of your accounts be likely to be in the market for additional General Motors stock on the assumptions we've been making?

A. Not unless it were a very attractive price.

Q. Have you ever had any difficulty at the Safe Deposit [fol. 2147] Company in purchasing all the General Motors shares that you thought an account should hold at approximately its market price?

A. No.

Q. Now, let me change the assumption, Mr. Lowell, a bit. Assume with me now that the court has ordered the Government plan but makes one change in the other assumptions. Assume that du Pont has announced that it will pay out the General Motors shares which it is ordered to distribute pursuant to that plan in lieu of cash dividends—first let us assume in lieu of all of its cash dividends. On that assumption, now, would the Safe Deposit Company sell or retain the du Pont stock which it has in its personal and its charitable trusts?

A. A very large—oh, almost all of them, we would have to sell.

Q. Would you explain why?

A. Because we have to produce income for the living beneficiaries and the way to produce income is to pay out cash, and the way to get cash is to sell the stock.

Q. Well, I am talking about whether you would retain the du Pont stock, not the General Motors stock.

A. Oh, I'm sorry.

Q. No, I am going back to my first question that I had asked on the prior set of assumptions.

Let me repeat it: Assuming that the Court orders the Government plan and that du Pont announces that it will pay out the General Motors stock which it is ordered to distribute in lieu of its regular cash dividends. Would the trust company retain or would it dispose of the du Pont stock which it has now in its accounts?

A. I think we would sell du Pont stock where we could, but we would not, perhaps sell as much as we would under the first classification that we covered.

[fol. 2148] Q. Would you say why you would sell?

A. Well, because we would—it would simplify it, without hurting our beneficiaries, to get it off the books when it was not paying its cash dividend; and, furthermore—although I don't know that this would really weigh very much—there would be the likelihood they might change their minds.

Q. Du Pont might change their minds?

A. Du Pont.

Q. Now, again assume with me that there is some of the du Pont which you do not sell. Under the assumption that the distribution of General Motors stock is in lieu of du Pont cash dividends, would the General Motors stock which you received in that distribution be likely to be held or sold by your trust accounts?

A. Sold.

Q. For both personal and charitable?

A. Yes.

Q. Well, now, let me change the assumptions again a little bit. Assume that du Pont announces that it would distribute 50 per cent of its dividend in General Motors stock and 50 per cent in its regular cash dividends. This would necessarily assume that the distribution would take longer than the ten years under the plan, so we will have to change our assumption there that the plan permits them to do that. Without going through all of these series of questions, how would that change your prior answers as to what the company would do with respect to the retention or sale of the General Motors stock received by way of distribution by your personal and your charitable trusts?

A. I don't think it would change at all on du Pont. I think it would tend to increase the sale of General Motors.

Q. Of the distributed shares of General Motors?

A. Yes."

[fol. 2149] Mr. Horsky: I will ask the reporter to mark this as du Pont Exhibit 43, for identification.

(Thereupon said document was marked Defendant du Pont Exhibit 43, for identification.)

"Q. Mr. Lowell, I hand you a document which the reporter has marked du Pont Exhibit No. 43 for identification, which is entitled, 'Boston Safe Deposit & Trust Co.—Action Taken in 80 Trust Accounts in Connection with 1935 du Pont Dividend of General Motors Common Stock.' Was this prepared under your direction and is it accurate?

A. This was prepared under my direction and is accurate, but I was not in the bank in 1935.

Q. I understand that.

This document shows in 1935, when the distribution was one share of General Motors for each 55 shares of du Pont, the amount of scrip that was sold, and was distributed in various trusts and the amount of full shares which were sold and which were distributed in the trusts.

Did this information come from the books and records of the Trust Company, sir?

A. From what records?

Q. From the books and records of the Trust Company?

A. Yes, sir.

Q. What happens, Mr. Lowell, in your accounts that hold the Standard of Indiana stock which occasionally, as I understand it, gets a small dividend in Standard of New Jersey stock? What do you do with the Jersey stock?

A. That is income, and we sell it and pay it out, except in a very few cases where it is large enough so that somebody may want to have the stock itself, but that is very rare.

Q. Now, Mr. Lowell, let me change our assumptions once more. Let me assume this time that the Court has ordered the Government plan put into effect, but that it has extended [fol. 2150] the time within which it is to be accomplished from ten years to twenty years. Let me also assume for these first questions that du Pont has decided, pursuant to that plan, to pay out the General Motors stock in addition to its regular cash dividend.

Under those circumstances, would the plan extended to twenty years, would the Trust Company be inclined to retain or to sell the du Pont stock which it has in its trust account?

Q. I don't think it would change. The extension from ten to twenty years wouldn't change our minds on the sale of du Pont stock.

Q. Would that be equally true of charitable trusts?

A. Equally true of what?

Q. Of charitable trusts?

A. Oh, yes.

Q. Under this twenty-year assumption, now, would there be accounts in your bank which would be likely to be purchasers of du Pont stock?

A. Rather less than under the ten-year plan.

Q. Under this twenty-year assumption, Mr. Lowell, would the company, the Safe Deposit Company be more or less inclined to sell the General Motors stock which it received by way of distribution, assuming now that it is in addition to du Pont's regular dividend?

A. Rather more.

Q. Suppose it were to be in lieu of dividends. Would it be more or less inclined than it would be under the ten-year plan to sell the General Motors stock?

A. Rather more, because it would increase the number of years of the problems that I said we would have.

Q. On this assumption of a twenty-year plan, would the Safe Deposit Company be a purchaser of additional shares of General Motors for its accounts?

A. No more than under the ten-year plan, rather less.

[fol. 2151] Q. Rather less. Thank you.

Now, let me turn, Mr. Lowell, from the Bank to the John Hancock Mutual Life Insurance Company. Du Pont Exhibit 42 shows that you are a member of the Finance Committee of that company, and you told us in connection with that exhibit that you were the senior member other than the officer members of the committee. What person or committee in John Hancock makes the decisions with respect to its investment policy?

A. The Finance Committee.

Q. Is the Finance Committee divided into sub-committees?

A. There are two sub-committees, but they report to the Finance Committee, and the Finance Committee acts on their recommendations.

Q. What are the two sub-committees?

A. One is the so called Equity Committee, which deals with common stock; and the other is the Mortgage Committee, which deals with mortgages, both city mortgages and farm mortgages.

Q. Are you a member of the Equity Committee?

A. I am.

Q. You have been for how long?

A. That is since its inception.

Q. Now, without getting into a discussion of the details, Mr. Lowell, can you state in general the legal limitations with respect to the purchase of equity securities by mutual life insurance companies in Massachusetts—applied to John Hancock is what I am asking you?

A. The legal limitations are not in Massachusetts, they are in New York.

Q. Well, do you have any self-imposed limitation which you apply to your own company?

A. Yes, we have. We made a vote—because we weren't absolutely clear how the New York rule would apply to us—we made a vote so that we would be sure that we were within the limits that they had.

[fol. 2152] Q. Do you have with you a statement of the John Hancock limitation which it imposes on itself?

A. I have it here if I can put my hand on it.

Q. Would you give us its date?

A. May 9, 1955. The entire board of directors voted as follows:

> 'Voter in response to a recommendation of the investment Policy Committee to approve the policy of investment in common stocks, provided that no purchase be made at any time when the book value (cost) of such investment held by the company exceeds four per cent of its admitted assets according to the next preceding annual statement.'

Q. Is that a limitation, Mr. Lowell, which is more limiting than the law itself?

A. It is much more limiting than the Massachusetts law, which is a prudent man law, and its limits, from what we understand, are written in the New York laws at the present time.

Q. Now, using round numbers, Mr. Lowell, can you state the present industrial common stock portfolio of John Hancock?

A. From the book or from the market?

Q. Both; both.

A. A hundred—wait a minute—well, the market's about 216 million, and the books about 106 million.

Q. How does that compare with the amount which you could invest under your policy?

A. I think 106 is about 2½ per cent.

Q. So it's a little more than half of the amount which your policy permits you to have if you took it to the limit. Do I understand you correctly?

A. Well, I could give it to you this way: At the end of 1958, we could have had 217 million and we had 106.

Q. Why is the level of your holdings below your per- [fol. 2153] mitted level—or the level you permit yourself, I should say?

A. The problem that the John Hancock Finance Committee has is to invest its funds to the best advantage of the holders of their policies, and there are three big groups in which you invest your funds. You can invest them in fixed assets—I mean bonds, I don't mean buildings—you can invest them in mortgages, and you can invest them in common equities; and we fluctuate, we are elastic enough so that we can move from one group to another group, and whatever group gives you the best advantage for your beneficiaries; and therefore we have not been buying common stocks when the yield of the common stocks got well below what we could get on mortgages and bonds.

Q. Can you tell me whether you purchased more common stocks than you sold, or the other way around last year or in the last five years perhaps?

A. Well, last year I think we sold more than we bought, because we bought very few and we sold—I am not sure if it was last year, or it may have been just before last year—we sold $10 million worth of common stocks, and we thought the market was too high.

Q. Do you have the figures for five years there, sir?

A. I am afraid I haven't got those figures right before me.

Q. Very well. Will you state, Mr. Lowell, the amount, approximately, as you would estimate it, that the ceiling that you impose on yourself under this resolution of the Board will increase each year for the next, say, five years; that is, the amount of additional common stocks which you could purchase under the resolution?

A. Basing our experience on the growth of the assets of [fol. 2154] John Hancock, we figured that as of December 31, 1958, which is the figure I just gave you, we could have

had, at four per cent, stocks costing $217,000,000; at the end of '59, we figured two hundred twenty-nine million; at the end of '60, two hundred forty-one million; at the end of '61, two hundred fifty-three million; at the end of '62 two hundred sixty-seven million. All those figures, on the basis of the growth of the company, will be in line with the experience we've had in the last five or ten years.

Q. If I listened correctly, that's about twelve or thirteen million dollars a year increase.

A. That's right.

Q. How much du Pont common stock does John Hancock now own?

A. 13,500 shares.

Q. Has that holding changed substantially in recent years?

A. We sold 1,500 shares in 1956.

Q. Was that part of this ten million dollar sale that you mentioned?

A. Yes, it was an across-the-board sale of our holdings, it had nothing to do with any one individual company.

Q. Have you considered purchasing additional du Pont common stock recently?

A. Yes, we have. It was brought up on recommendation of the financial department, which comes to the Finance Committee, and we decided not to do so.

Q. What was your own reason that you agreed with that decision?

A. My own reason—and I'm confident it was shared with the others because we debated it out—was because of the imminence of this suit.

Q. What is John Hancock's present holding in General Motors?

A. 90,000 shares.

Q. How has that holding changed in recent years, if it has?

A. Five years ago we had 18,500 shares.

Q. I didn't hear that answer, sir, I am sorry.

[fol. 2155] A. Five years ago we had 18,500. In 1954-55 we bought 15,100 and subscribed in '55 to 1500 shares. Then the stock split brought it up to 90,000 shares. In 1956 we had sold 15,300 shares at the same time we sold the du Pont and part of the ten million that we sold.

Q. Has John Hancock ever, to your knowledge, had

any difficulty in purchasing whatever amount of General Motors stock it wanted?

A. Never.

Q. Now, is there any difference, Mr. Lowell, in the kind or type of industrial equities which John Hancock purchases and those which you purchase for your individual accounts at the trust company?

A. No. You always have to bear in mind that one of the things about personal trusts is that your personal trust has a due date. We don't know when the due date is necessarily. It depends on the life of the beneficiary and certain things. John Hancock has no due date, so that you could, under certain circumstances, hold in John Hancock where you might feel you might have to sell in some of our trusts. Do I make myself clear in that?

Q. Yes. Now, Mr. Lowell, let me go back to our hypothetical questions again, and let me ask you again to assume the same as we did with the Safe Deposit and Trust Company: First, that the Court has decided to order the Government plan and, second, that du Pont has decided to pay out the General Motors shares as required by that plan, in addition to its regular cash dividend. On those assumptions, would John Hancock, in your opinion, continue to hold its present du Pont shares?

A. This is where they paid out not as a dividend, not as a cash dividend but in addition to it?

[fol. 2156] Q. In addition.

A. I would think in John Hancock we would hold it.

Q. Would you be a purchaser of additional shares of du Pont under those circumstances?

A. No, no. You've got to bear in mind our 4 per cent, and we've only got 2 per cent; and if we start buying common stock and the whole list is in a buying position, we might include du Pont in there. We wouldn't buy it because of what it was doing, because of what you said.

Q. Would it have a restraining influence on your buying?

A. Yes.

Q. Under the same set of assumptions now—that the plan has been ordered and that du Pont is paying out the General Motors shares in addition to its regular dividend—would John Hancock be inclined to hold or to sell the

General Motors shares which it receives on its present holdings of du Pont?

A. I think we'd be inclined to hold it.

Q. Would you be inclined to purchase additional General Motors shares?

A. No, we would drop General Motors down a classification in our minds, I think.

Q. Because of this plan?

A. (Witness nodded head affirmatively.)

Q. Now, let me change the assumptions, Mr. Lowell, and assume that du Pont decides to pay out the General Motors shares in lieu of its regular dividend, 100 per cent in lieu to begin with. On that assumption, would John Hancock continue to hold its du Pont?

A. If it held its du Pont, it would sell its Motors. I don't think we'd buy any more du Pont, and I think we'd have a tendency to sell. It would depend on the price of what du Pont was selling at in relation to the market.

[fol. 2157] Q. Would it make it less attractive or——

A. Less attractive.

Q. Now, you say you think under those circumstances you would sell General Motors.

A. If General Motors was given in lieu of cash dividends, I think we should sell the General Motors.

Q. Would you be inclined to be a purchaser of additional shares of du Pont or General Motors under those circumstances—for John Hancock I'm talking about?

A. It would depend on the return and what we at that time considered the possibilities—I'm talking about du Pont—of du Pont earnings over the next several years.

Q. Would it make it more or less attractive?

A. Less attractive.

Q. And now with respect to General Motors.

A. I'd say it would hold true there, but to a greater extent.

Q. Suppose we change the assumptions, Mr. Lowell, to make it a distribution of part cash, let's say 50 per cent of its dividend in cash and 50 per cent of its dividend in General Motors stock. Under those circumstances, would John Hancock sell its du Pont stock? Would it change your prior answer, perhaps, is the easiest way to ask you?

A. I don't think so.

Q. How about with respect to General Motors?

A. We'd sell General Motors that we received as a dividend.

Q. Now, let me change the assumptions once more, as we did before. Let me assume that the Government plan has been ordered but that it is extended to 20 years instead of 10 years. Assume again with me, as we have before, that du Pont decides to distribute the General Motors stock in addition to its regular dividend; in other words, [fol. 2158] the same as the first assumption we made except in a 20-year period.

On that assumption, would John Hancock continue to hold its du Pont stock?

A. It would make it less attractive, but the same conditions would be taken into consideration.

Q. Would you purchase additional du Pont stock?

A. Again, a little less attractive than if we had decided to purchase it on a 10-year basis.

Q. Now, turn to the General Motors side of that. Would you sell or retain the General Motors shares which you received at John Hancock?

A. We would carry out the same results that I mentioned before. The 10-to-20 would not materially change it.

Q. Now, the last set of assumptions.

Assume that du Pont decides to pay out the General Motors stock in lieu of its dividends, its cash dividends, for 20 years. On that assumption, would you hold the du Pont?

A. We certainly would not buy any du Pont. It would depend if they paid their full dividend in General Motors. I think our tendency would be to sell. The Mutual Insurance Companies all watch each other to see what the net return of their investments as a whole are, and the company does not like to get down to show less return than the other companies because that is an argument that's used in selling insurance, and inasmuch as the dividend would not be cash, we would sell the dividend to get the cash to show the return, and we tend not to buy du Pont because we'd have to go through those extra steps of selling the General Motors.

Q. Would you be inclined to buy General Motors stock under those sets of assumptions?

A. Well, if we'd sold it as a dividend, I don't think we'd replace it.

[fol. 2159] Q. Suppose, Mr. Lowell, that the du Pont

Company's policy was 50 per cent cash and 50 per cent General Motors stock with respect to its dividend. Then would that change your answers?

A. I don't think it would change them.

Q. Now, one final assumption, Mr. Lowell—suppose at this time a completely different assumption. Suppose the Court were to order—let me ask a preliminary question. Have you read the du Pont plan?

A. Yes.

Q. Suppose the Court were to order the judgment proposed by du Pont. Would that plan, would that judgment in your opinion alter the present attitude of either the Safe Deposit Company or the John Hancock toward either General Motors or du Pont stock?

A. Oh, yes, I think it would change it almost entirely.

Q. What would it do, sir; in what respect?

A. Well, as I understand the du Pont plan, the General Motors stock would be held for the benefit of the du Pont stockholders, that du Pont would have no control over the voting of the thing, the vote would go down to the other——

Q. That's right, but my question, sir, is whether it would change your present attitude toward the stock of du Pont and the stock of General Motors. Would it have any market consequences, in other words? Would that plan have any——

A. I think it would have a favorable market result if that came out right now.

Q. Why, sir?

A. Because it would remove the fear and doubt about what might be done."

Mr. Horsky: I am willing to offer the cross examination but I understand the Government would want to read some of the cross.

Mr. Reycraft: I intended to offer the cross examination. [fol. 2160] Mr. Horsky: I have some more that I would like to read. Would you continue? This is cross examination, your Honor. When I come to 56 I will yield to you.

Cross-examination.

By Mr. Metzger:

"Q. Mr. Lowell, if I may, I'd like to get a little bit more information as to the makeup of the trusts in the Boston

Safe Deposit and Trust Company. I believe you stated that you have assets—that's on a cost basis, I presume?

A. That's a what?

Q. The assets you spoke of before, the one billion, one hundred eighty-seven million, that is the amount that was given to you, not the asset value of the assets held?

A. That's made up of the book value of most of the trusts and the market value of some of the agency accounts.

Q. I see. I believe you stated that you have $56 million in your common trust fund?

A. That is approximately correct. It's right close.

Q. As to the general run of your trusts, sir, is the bank a trustee, having the right to change the portfolios in the vast majority or in the majority or in some cases?

A. Well, as a guess I would think that in 75 per cent of our trusts we had the full right and the other 25 per cent have co-trustees.

Q. I see. Would you explain to me, sir, the nature of your agency accounts?

A. Well, they vary quite a bit, the agency accounts—from where you can't tell the difference between a regular trust account and then they go all the way down to where you simply hold securities and have no investment responsibility.

Q. And what would you say that the bank's responsibilities as to the agency accounts were? Would that be [fol. 2161] about the same percentage?

A. No, it would be a lesser proportion in agency accounts.

Q. Would you care to make a rough estimate, sir?

A. Well, perhaps we could almost reverse those figures and say 25 per cent. You see, the reason for that is agency accounts are mostly living people and they don't like to give up their full control.

Q. What proportion, sir, would you say of your overall accounts were agency and what would you say were trusts?

A. It is divided about 60 per cent in agency and 40 per cent in trusts. I can give you those figures. It's five hundred forty-seven million in trusts and it's six hundred fifty million, roughly, in agency accounts."

Mr. Horsky: I will skip to page 45 now, at the top of the page.

"Q. As to your charitable trusts, sir, you spoke of the problem of the receipt of this distribution under Massachusetts law as income to your—at least your personal trusts—and you stated that as to those charitable trusts you would be inclined to sell the General Motors stock thus received since it was income, is that correct?

A. I testified that we would sell du Pont so that we would not receive General Motors.

Q. In your charitable trusts, sir?

A. Yes, sir.

Q. Why?

A. For that very reason, that we would not want to have that General Motors stock which we would have to use as income in Massachusetts when we believe it really is a distribution of the assets of the du Pont Company.

Q. Is it necessary as to the charities that this be sold? [fol. 2162] Let us say that the distribution that came through in the charitable trusts were still holding du Pont stock and it received General Motors stock as income on that distribution. Would it be necessary for the charity to sell?

A. The largest charitable trust that we have is the Hyams Fund. Mr. Hyams left that fund, the principal to be kept intact and the income only to be used for charity.

Now, one of the leading lawyers in this city, Mr. Sampson, of Hutchins & Wheeler, is the managing trustee with the bank on that, and he is very much worried about this and says that they would have to sell. He's backing up my opinion on it.

Q. It is the opinion of yourself and of your counsel that charitable trusts receiving this stock in Massachusetts must sell?

A. Unless there is the provision that you can treat it as principal——

Q. Would you expand on that a bit, sir?

A. Unless you can treat it as principal instead of income.

Q. In what event could you treat it as principal?

A. If you're given the authority to decide in any trust whether a distribution can be added to principal or should be income.

Q. Now, the Massachusetts law, then——

The Massachusetts law applies over that, that we would sell.

Q. The Massachusetts law applies only in the instance where you do not have that discretion?

A. Well, I'm not a lawyer.

Q. Well, that is your understanding, sir.

(Witness nodded head affirmatively.)

Q. Are any of your charitable trusts now in existence worded in that manner, giving you that discretion?

A. Not that I know of.

[fol. 2163] Q. Then it would be necessary to obtain a change in Massachusetts law before this problem would be completely eliminated for your purposes?

A. Well, yes, before the problem is eliminated it would be, but I don't expect you to effect that change in the law.

Q. You made the statement, sir, that you had received correspondence relative to the receipt of Standard Oil of New Jersey stock as a dividend on Standard of Indiana.

A. No. The correspondence was when Jersey declared a dividend in their own stock.

Q. In their own stock.

A. Yes. Indiana is the one that declares a dividend in Jersey stock.

Q. Now, as to the Standard of New Jersey situation, you stated that, 'We and others from here were responsible for Standard's ceasing this practice'?

A. In part. They wrote back that we were, in part.

Q. Then to your knowledge, sir, is Massachusetts the only jurisdiction in which the problem is as severe?

A. I understand there are seventeen other States that have the same——

Q. The same provision.

A. I can't say it spells out word for word the same, but I understand there are seventeen other States that have the same ruling."

Mr. Horsky: I will skip, Mr. Scott, to the lower part of page 48.

"Q. In any instance, sir, where you received General Motors stock as income to a personal trust or to an agency account, where you had the authority would you sell that General Motors stock?

A. Well, where we had the authority. I think this—I don't know what that number is, but I think that shows what

[fol. 2164] happened in the past, and I think we'd do the same.

Q. Well, I am coming to that, sir."

Mr. Horsky: That is Exhibit, du Pont No. 44.

(Thereupon said document was marked Defendant du Pont Exhibit 44, for identification.)

"Q. What is the reason why you would sell that General Motors stock?

A. I thought I made it clear that we have to pay out to the living beneficiary or beneficiaries, which there are in many, many trusts, cash income which they're entitled to, and to get that income we would have to sell the General Motors to get the cash to pay it out.

Q. The trusts are worded in such a way that the distribution must be in income?

A. No, not necessarily. The income of the trust—the beneficiary is entitled to income. Now, you can't in many cases—we've got a great many small and moderate-sized trusts where such a distribution would be a very few shares of General Motors, and you can't split one share into five pieces, so to speak.

Q. Suppose that you are dealing with a large trust, sir, in which perhaps there might be a thousand shares of General Motors to distribute. Would that change your——

A. You saw the results back in whatever date this was, 1935, in the larger trusts; shares distributed to beneficiaries: from eight trusts, 14 shares out of a total of 57 trusts —no, 23 trusts.

Q. All right, sir.

Turning to that paper for a moment, the indications here are that there were fifty-seven trusts, each holding fifty-five shares or less. This would mean that in no event would there be a full share of du Pont involved, is that correct?

[fol. 2165] Mr. Horsky: Of General Motors, you mean.

Q. A full share of General Motors received on account of the du Pont stock held.

A. That was so in this case in '35.

Q. As to those trusts holding one or more shares, entitled to one or more share of General Motors, shares were sold as to twenty-one, distributed as to fourteen, and added

to principal as to three. Do you, sir, have any knowledge of the size of these various trusts?

For example, as to the twenty-one trusts, as to the twenty-one shares distributed, sold, this would indicate that roughly 1½ shares were attributable to each trust.

A. I think that—Is this No. 1?

Q. This is the document headed 'Action taken in 80 trust accounts in connection with 1935, du Pont dividend of General Motors common stock.'

A. Now, to come back to the holdings we have today, I think that's spelled out as to the number of shares that you hold in each trust, and that's No. 1, I think.

Q. Well, as to this document, sir,——

A. Well, that document, of course that was back in '35, I was not in the bank; and the trusts, generally speaking, were fewer at that time, and also they had less equities in that time than they do today.

Q. In no instance did the amount attributable to any one trust and the average here exceed one and a fraction shares, is that correct, sir?

A. You're talking about the first group of the fifty-seven?

Q. No, I'm talking about the second group of twenty-three trusts.

A. Oh, no, because you see fourteen shares were distributed to eight trusts; divide—that—that's what you're dividing.

[fol. 2166] Q. On the average, as to two trusts, it would be 1½; and as to thirteen trusts, the average would be about 1½ again?

A. Yes.

Q. As a matter of administration, sir, would you recommend that a trust retain stock of 1½ shares?

A. No, no.

Q. Then the sheer nuisance value of such a small distribution would incline you to sell it.

A. That is right.

Q. Would that be true, sir, in the event that you were dealing with a distribution to a trust of several hundred or more shares at a given time?

A. It depends on how many beneficiaries there were, but you're also taking the assumption that we would take this distribution under the Massachusetts law as income, and

my assumption has been that we've sold the du Pont so that we would not be faced with that problem because of the ultimate beneficiaries' interest in the trust.

Q. You would sell du Pont stock, sir, rather than receive General Motors, which you would then sell?

(Witness nodded head affirmatively.)

Q. Why would you sell the one rather than wait and sell the other?

A. Because if we sell the du Pont, we then do not receive the General Motors, do we.

Q. That's right, sir.

A. If we don't sell the du Pont and receive the General Motors, we then have to apply the Massachusetts law and call those General Motors income. If we do that, we open ourselves to litigation in the future by the remaindermen as against the living beneficiaries.

Q. Well, sir, if this stock is by force of law income, what litigation could there be as to a distribution you made of [fol. 2167] income to the beneficiary?

A. Because some of those beneficiaries may not be residents of Massachusetts, and this is a Massachusetts law and not a federal law. The federal law would allow you to treat it as it should be treated: as principal.

Q. But if it is a Massachusetts trust, must it not operate under Massachusetts law?

A. Yes, it operates under Massachusetts law, but we don't want to run the risk of being—you see, my job is to run the bank as it is now and not to build up headaches for the future management of the bank, and we can dodge all those possible headaches, or probable headaches, or sure headaches by selling the du Pont stock; therefore, we sell the du Pont stock.

Q. Have you consulted counsel, sir, with regard to potential litigation on that point?

A. We have, I have talked informally with our own lawyers and I've talked, as I mentioned, with Mr. Sampson on the question of the—in fact, he is the one that brought it up in the large charitable trusts that I mentioned.

Q. As to this particular point, sir, that is, the possibility of remaindermen suing because of a distribution, have you had any indication that your attorneys are concerned on that point?

A. Very much concerned.

Q. Sir, you made the statement that in the event that du Pont was required by the court to distribute General Motors stock and did so by distributing in lieu of a dividend completely General Motors stock, that as to some trusts you would sell and some you would not.

(Witness nodded head affirmatively.)

Q. In the event that 50 per cent were paid in cash and 50 per cent in General Motors stock, you stated that you would be inclined to sell more of this dividend stock. Would [fol. 2168] you explain to me, sir, the reason for this increase?

A. Did I say, 'more'?

(Continuing)

The witness: I don't remember saying 'more.' I said there might be a slight tendency, but 'more' means a lot.

Q. Well, is it your present impression that you would sell more or less?

A. I have mentioned a few cases where you might retain the General Motors stock at the request of the beneficiaries. The smaller the amount of General Motors applying to each trust, the less likelihood there would be of that retention; therefore, I think the tendency would be to sell more if it was half or a quarter or a third or a smaller fraction.

Q. Now, sir, as to the John Hancock Mutual Life Insurance Company, you made the statement that you hold a portfolio of roughly 2½ per cent, I believe, in equities. 2½ per cent in equity of the corporation's admitted assets.

A. And that is at book.

Q. At book?

A. Yes.

Q. In 1956 you made an across-the-board decrease in the amount?

A. $10,000,000.

Q. And that was right across your portfolio?

A. Well, that's 99 per cent sure. I wouldn't say that there wasn't a small holding. We might have sold the holding. The theory was that our holdings were so good that the fairest way to do it was across the board.

Q. Is that still your opinion, sir, that any increase or decrease as to your portfolio would probably follow the same pattern?

A. Oh, no, an increase in your portfolio would depend on the individual situations that you were purchasing. If we [fol. 2169] thought that again the market had got where we should sell, I would think we'd do it the same way as we did before. Does that answer your question?

Q. Yes, it does."

Mr. Reycraft: Would you like to continue, Mr. Scott?

Mr. Scott: If you want me to, I will.

Cross-examination.

By Mr. Reycraft:

Q. Sir, could you tell me what level, amount of taxes John Hancock pays on its dividends received, on its equities held, roughly?

A. The amount of taxes?

Q. Percentage?

A. I don't know, I don't know, and as you know—that whole thing is rather up in the air at the moment. The Government is discussing with the insurance companies what they should do on taxes, and they are running up against the mutuals and against the stock companies, and they're having a regular nice fight about it. I don't know, but it's not very much.

Q. Are you aware, sir, that on the dividends received from du Pont, insofar as those dividends include dividends received by it from General Motors, that du Pont is paying a tax of 7.8 per cent on that General Motors dividend money?

A. I am sorry; I can't answer. I don't know.

Q. You don't know.

Well, let us assume that du Pont pays 7.8 per cent on that dividend, and John Hancock then receives a dividend from du Pont; in the event that du Pont distributed its General Motors stock to John Hancock, if we assume John Hancock to be paying a small amount tax on its dividends, could we not conclude that John Hancock would be receiving rather quickly an increased amount of money by [fol. 2170] reason of its holding two pieces of paper, a General Motors stock certificate and a du Pont stock certificate, whereas now it holds one?

A. I don't see that John Hancock would receive any more money unless the dividend on either or both was increased.

Q. All right, sir. Let us take an example. General Motors pays you a $2 dividend. It pays du Pont a $2 dividend. On that $2 dividend the federal Government takes 7.8 per cent in taxes, roughly, one and a half cents per share—15 cents per share, pardon me. That tax is taken out upon the transfer, du Pont then pays its stockholders a dividend. This transfer tax would be eliminated if the stockholders of du Pont received stock in General Motors and in du Pont in lieu of stock simply in du Pont. Have you made any attempt or has any attempt been made at John Hancock to ascertain the tax saving on the distribution as opposed to the taxation in the event of a distribution to John Hancock?

A. I have no knowledge that they have made such a study.

Q. If such a study indicated to you that, let us say, within five years John Hancock would be receiving a larger amount of income on the same corporate earnings of the two corporations, would you as an executive of John Hancock favor or disfavor a distribution?

A. You've got a good many 'ifs' and 'buts' in there. I still don't see that John Hancock would benefit unless the General Motors or du Pont increased their own dividends.

Q. Well, let's say, sir, that over a five-year period du Pont is paying 75 cents a share of its General Motors stocks in taxes. If that tax were eliminated by a distribu-
[fol. 2171] tion to the shareholders of du Pont of its General Motors stock at the same earnings or dividend rate of General Motors and if on such a distribution John Hancock paid a 50 cent tax, wouldn't you assume that John Hancock would be better off at the end of that period financially on the same earnings of each company?

Mr. Horsky: Mr. Metzger, are you assuming that every other stockholder of du Pont is in the same position?

Mr. Metzger: No, I am speaking, sir, of John Hancock Mutual Life Insurance Company solely.

Mr. Horsky: And what are you assuming happens to other stockholders of du Pont in your question?

Mr. Metzger: On this assumption, I am dealing solely with John Hancock.

Mr. Horsky: But doesn't John Hancock take into account other factors than what you have stated to Mr. Lowell?

Q. If there are other factors applying to other stockholders, please bring that out.

A. Well, I am sorry to seem stupid, but I don't think—If I understand what you are saying, du Pont would then not have received any dividend from General Motors, is that right?

Q. That's right, sir, the stockholders of du Pont would be receiving the dividend directly.

A. That's right, so the du Pont dividends would be reduced by the amount they now hand on from what they received from General Motors because they wouldn't have it, is that right?

Q. Less the amount that they have paid out in their transfer tax, which is essentially a transfer tax.

A. But they won't have a transfer tax and they won't have any income from General Motors.

Q. That's right, sir, but this tax will be eliminated, which [fol. 2172] amounts to 15 cents per share per year?

A. Are you then taking the position that the du Pont stockholders will hand over that 75 cents to their stockholders?

Q. But John Hancock then, sir, would be receiving—

A. John Hancock won't receive any more than it receives now unless there is an increase in the dividend of one of the other, or both.

Q. All right, sir, let me give you an example. This is a difficult proposition.

A. Well——

Q. Du Pont, let us say, makes $500,000,000 today.

A. Put it down in numbers of shares. Du Pont earns $4.65 a share.

Q. I'd rather not do that for this proposition.

Du Pont is now making $500,000,000. $2000,000,000 of that is in General Motors dividends. It pays out as a uniform policy, in this assumption, 60 per cent. It received $200,000,000 from General Motors and pays 7.8 per cent of that in taxes. It then distributes 60 per cent of its net income. If we eliminate that tax and General Motors dividends are no longer received by du Pont, du Pont's earnings will go down pro tanto but the amount received by

the stockholder will go up to the extent of the decrease in taxation.

A. The amount received by the stockholder won't go up unless the dividend is increased.

Q. No increase in dividends.

A. Well, then you don't get any more. General Motors pays its $2 and continues to pay its $2.

Q. But the Government does not receive 15 cents per share tax. That goes directly to the stockholder?

A. Yes, but it doesn't come to us.

Q. It would in this event, sir.

A. I am sorry, I can't follow you from your figures.

[fol. 2173] Q. Mr. Lowell, do you know that as to dividends that General Motors pays to du Pont, there is a 7.8 per cent tax, federal tax imposed?

A. I personally do not know that. I take your statement that it does.

Q. But you had not been aware of that prior to this time?

A. No, nor do I see why it is germane to the situation.

Q. Let's try it once more, sir, without the facts.

Let us assume that without an increase in earnings by the company, by holding the two stock certificates rather than the one, that John Hancock would be receiving more money than it is now, and that within several years that amount, increased amount of money would more than compensate for the taxation John Hancock would pay on the distribution. As an officer of the Finance Committee of John Hancock Mutual Life Insurance Company, would you then prefer a distribution or oppose a distribution?

Mr. Horsky: May I ask if I heard that correctly?

You are now asking the witness to assume that he will get a larger dividend?

Mr. Metzger: I asked that.

Mr. Horsky: You asked him to assume that.

Mr. Metzger: That is correct.

Mr. Horsky: And you asked him to assume that this larger dividend will be greater than the tax he will have to pay.

Mr. Metzger: Within the limited number of years, as an officer of the Finance Committee of John Hancock Mutual Life Insurance Company.

A. If you could assure me of those 'ifs' that you got, I

would be inclined to say yes; but I think you are taking on an awful lot of assumptions.

[fol. 2174] Q. As a member of the finance committee of John Hancock—and you are interested in receiving the largest amounts of income for the company, and you would favor any policy which would aid that program?

A. You realize that you are asking me as one member. I am not answering for the whole finance committee.

Q. Of course, sir, but this would be the essence of your recommendations as a member of the Committee?

A. If I thought you could get more income for any action that might be taken, I'd be inclined to agree to that.

Q. Now, sir, you stated that John Hancock Mutual Life Insurance Company would possibly sell, given the proper circumstances, its du Pont stock in the event that all of its du Pont dividends were paid in General Motors, because insurance companies carefully check each other's return rates and try to keep them as high as possible—rate of return?

A. Over-all rate.

Q. Over-all rate of return.

In the event that other mutual life insurance companies also held du Pont stock, how would it affect your average rate of return against their average rate of return if you both held that stock?

A. If we both held proportionately the same amount, it would not.

Q. Then your assumption was, in saying that you might be inclined to sell in that event, that either these companies did not hold du Pont or did not hold it in equal or approximately equal percentages that you held it?

A. That is true today.

Q. What is true today, sir?

A. That John Hancock has a larger holding of equities than the other mutual insurance companies, and therefore I take it probably they'd have a larger percentage of du Pont than others.

[fol. 2175] Q. On the average, sir?

A. Yes.

Q. Now, sir, you made the statement that as an investment you would drop General Motors a classification in the event that this stock were to be divested from du Pont?

A. That is right.

Q. Could you explain to me, sir, your reasons for concluding that General Motors would be a less desirable stock in such event?

A. Now we're back at where the Government says that the stock shall be distributed and/or sold within ten years?

Q. I would like you, sir, to assume any type of divestiture and make any distinction you care to make as to a different type of divestiture?

A. If there is a sale of General Motors overhanging the market, it would affect the classification of General Motors in my mind.

Q. I assume, sir, that when John Hancock buys a stock, it considers the strength of the company, its future, its earning powers, its costs, and loss factors. Assuming that none of these factors are affected by the divestiture and you are dealing with a temporary or permanent price drop, that is, solely a market value problem, all other things being equal, why should this affect your investment conceptions towards General Motors, assuming it still has the same earning power, the same future?

A. Let me say we would buy any stock, first, primarily on management; second, on earnings; and, third, on the profit outlook for the company and the amount of their earnings they paid out, which shows a net return to us. In the middle of that one is the future prospects, and the future prospects means really appreciation in the market, and with a lot of stock overhanging any market—it doesn't matter whether it's General Motors, or whatever else you want to have—that possible appreciation is lessened over [fol. 2176] the year or time that the cloud overhangs the market."

Mr. Reycraft: Mr. Horsky, I would like to skip to Page 68.

Mr. Horsky: I will read that part.

The Court: The Court stands recessed for ten minutes.

(A short recess taken.)

The Court: Counsel may proceed.

Mr. Horsky: I am going to read a bit more, your Honor, and I am going to ask Mr. Scott to repeat it with the last answer to pick up the continuity.

Will you begin at the top of page 65 for that answer?

Well, maybe I had better summarize the question. It was:

"What do you consider when you buy a stock?"

"A. Let me say we would buy any stock, of course, primarily on management; second, on earnings; and, third, on the profit outlook for the company and the amount of their earnings they paid out, which shows the net return to us. In the middle of that one is the future prospects, and a future prospect means really appreciation in the market, and with a lot of stock overhanging any market—it does not matter whether it's General Motors or whatever else you want to have—that possible appreciation is lessened over the year or time that the cloud overhangs the market.

Q. Then your objection would be to the short-term marketability of the—

A. Oh, the longer the cloud is there, the more it would affect it.

[fol. 2177] Q. But as a mutual life insurance company, if John Hancock found it necessary to hold on to a stock for another five years, presuming earnings were acceptable——

A. I did not say we wouldn't consider General Motors, I said we'd drop it one classification.

Q. Solely because of the fear that the marketability of that stock might be slightly affected or greatly affected?

A. Not because of the fear, but whether in our judgment it would be.

Q. That is the only reason, and if the earnings of General Motors were——

A. If you'll take the motor industry as a whole, I think we'd drop it a classification anyway, and that would mean two classifications in this case because we do not look upon the motor business, the three leading companies as having the same prospects for growth that they have had over the last ten years due to the fact that they're in this model race and every year bring out a new model, so we don't believe that they'll have the margin of profit that they've had in the past.

Q. That, of course, is aside from this problem.

A. That affects the whole motor industry, and then the fact that you put a cloud over any one of them—put it on

Ford or put it on Chrysler—would affect our feeling about that one over which the cloud hung.

Q. Now, let us assume that you have this fear regarding General Motors, that there is an overhanging amount of stock on the market, that General Motors offers a satisfactory rate of return and the general market for automobiles seems relatively satisfactory. Would you then, because of the possibility of marketability problems, be opposed to a purchase by John Hancock of General Motors stock?

A. We would expect that having come down a classifica-
[fol. 2178] tion, it might have a compensating increase in its yield; and in that case we'd be inclined to buy it.

Q. What would you consider to be a compensating increase in yield?

A. That's impossible to state, because it has to do with the level of not only the stock market but the bond market, mortgage market and everything else.

"Q. What would you as an individual recommend to be this difference?

A. I as an individual would not buy General Motors with this cloud overhanging the market. I think there's another thing that you haven't given thought to, and that is that General Motors is a great company and it's a growing company, and it undoubtedly will have to do more financing in the future; and if it continues to be the great company that it is, at least a part of that financing could be in equity money and that complicates the question because not only have you a cloud over there, but you've got this equity money coming out, and I think you'd find they'd have to pay more money in terms of price for their stock and in terms of commission to their underwriters than they would have if this cloud were not overhanging the market.

Q. Have you read the memorandum filed by the United States in this case on September 26, 1958?

"Mr. Horsky: Is this what you're referring to?

The Witness: No, what Mr. Cox has. I don't recognize it.

"Q. Well, let us assume that the Government plan envisioned—in the event that General Motors did plan equity financing or any large scale financing which would require a clear market—that the Government plan envisioned a suspension of any distribution for such period as the in-
[fol. 2179] vestment bankers felt was necessary to accommodate the equity or other large financing of companies.

Would this affect your opinion as to the dangers in such an overhang?

A. It couldn't affect my opinion, because the cloud would be still there. The postponing of it does not remove it. Do I make myself clear?

Q. Yes, sir, you do.

Q. (By Mr. Reycraft): Mr. Lowell, you testified as to the relative size of the Boston Safe Deposit and Trust Company as compared with other Massachusetts trust companies?

A. Yes.

Q. Will you repeat your testimony, sir? Is it the largest in Massachusetts?

A. No, we're the second largest. The Old Colony Trust Company is the largest.

Q. I believe Exhibit No. 2——"

Mr. Reycraft: That is du Pont Exhibit 43.

"Q. —if you will refer to it, please, indicates that the Boston Safe Deposit and Trust holds a total of 89,100 shares of du Pont stock.

A. That is right.

Q. Now, you testified as to what action the Boston Safe Deposit and Trust Company would take in the event of various alternative methods of distribution.

Would you state what your understanding is of the total number of shares of General Motors which you would receive during any one year on a 10-year distribution basis?

A. I do not know that figure.

Q. Do you know as to a 20-year distribution basis?

A. Well, I suppose it would be half the 'en.

Q. If you assume for the moment, Mr. Lowell, that on the 10-year basis there would be approximately 12,200 shares in General Motors which you would receive——

A. What was that, 12,000?

Q. Yes, sir. You now hold a total——

[fol. 2180] Mr. Horsky: Might I ask, Mr. Reycraft, is that on the 89,100, assuming that he holds all of the du Pont?

"Mr. Reycraft: Yes, sir.

"Mr. Horsky: Which is contrary to what he said he would do.

"Mr. Reycraft: Well, I understand a lot of various alternatives——

"Mr. Horsky: Well, my understanding was that he indicated pretty clearly that under almost any alternative, he would sell the du Pont shares that he now holds, but you can assume it any way you wish.

Q. All right, assume it to be the case, that under any set of circumstances you would sell the du Pont stock, and one of the reasons for this decision would be that you are receiving dividends of General Motors stock on the du Pont stock; and you have testified that you don't know how many shares of GM stock you would receive, is that correct? You don't know?

A. Well, you tell me—I don't know. It would depend on how much du Pont we sold. I don't see how anybody could figure that out.

Q. Well, I suggest it's approximately 12,000 shares.

A. If we did not sell du Pont, you say we would receive 12,000 shares?

Q. A year, yes, sir.

A. I accept your statement.

Q. Well, in deciding, in coming to your tentative conclusion that you would sell the du Pont, I assume that you did consider the number of General Motors shares that you would receive on a distribution, is that correct?

A. No.

Q. You did not?

A. I don't understand your question.

[fol. 2181] Q. Well, you have testified that under several sets of assumptions you would sell du Pont stock?

A. That's right.

Q. One of the reasons given being that you would be receiving stock of General Motors as a dividend. I assume you considered; in reaching this conclusion, the number of shares of General Motors stock that you would receive on the distribution.

A. If you're asking me if we figured out in each trust how many General Motors we would receive as a result of du Pont, we have not done that.

Q. Or on a total basis?

A. It would take a long while to do that. Your figure of 12,000 shares roughly divided into our holdings of General

Motors would seem to be less than three shares to a trust.

Q. Well, it would be a very small amount that you would receive?

A. Yes, the smaller the amount, the more apt we would be to sell it.

Q. Pardon me, sir?

A. The smaller the amount, the more apt we would be to sell it.

Q. Yes. Does the Boston Safe Deposit and Trust Company hold any Christiana Securities stock?

A. I'm sorry, I didn't check that. I don't think we do. If we do, it's a very, very small amount.

Q. You've testified, Mr. Lowell, generally to what you referred to as the market overhang of the divestiture in this case we're referring to. Have you considered, in evaluating General Motors as an investment stock, the quantity of purchases which General Motors itself makes of its own stock on the market?

A. No, not as it affects this distribution; nor do I see why we should.

Q. Well, you have not considered it for whatever reason.

A. Yes. There's no reason we should consider it.

[fol. 2182] Q. Do you have any idea how much of the total stock General Motors purchases annually on the stock market?

A. No, I have not.

Q. How do you reach your conclusion that the divestiture of stock in this case would have a depressing effect or an overhanging effect on the market?

A. Well, I reach it from—which it seems to me the perfectly logical thing; that all of a sudden you have more for sale, at the same time you have less desire to purchase, and therefore you throw your market out of balance; and the only way you get it in balance is to restore the equal supply and demand, which would be at a lower level.

Q. If we assumed for the moment that there was a demand equal to the supply which would be coming on the market as a result of this divestiture, what then would be your opinion on the effect——

A. You asked me to assume something that I don't believe.

Q. Well, sir, I suggest to you that over the last twelve

years, perhaps, General Motors has purchased approximately fourteen million shares of its own stock on the stock market. Now, assuming that over the next ten years it continues to purchase this much, or more——

Mr. Horsky: You mean it doubles its purchases, it increases over what it already has been doing by the same amount?

Mr. Reycraft: It continues to purchase at the same rate.

Mr. Horsky: Oh, it continues.

Q. —and assume that the same amount of stock is sold pursuant to a court order in this case. What then would your judgment be as to the relative effect of those two [fol. 2183] series of transactions on the price of General Motors stock?

A. Are you assuming that General Motors purchases of their own stock will equal their distribution?

Q. Assume that.

A. And could that be done off the stock market?

Q. Assume that it is not.

A. If it were done off the stock market, it would not affect General Motors on the stock market.

Q. Assuming each series of transactions were to take place in the normal brokerage method, in other words, an order placed for execution on the Exchange in each case. What then would your judgment be as to the relative impact of the two series of transactions?

A. Well, you see, you are putting in so many assumptions —it would have to be done at the same time to have no effect at all. If, say, next Wednesday General Motors said, 'We're going to buy 20,000 shares of our stock' and the trustee says, 'We're going to sell it' and it goes on the Stock Exchange, it doesn't have any effect of course; but if the purchasing is at one time or it is spread out over a time and the selling is at another time, or concentrated, it will have an effect. Do I make myself clear about offsetting the balance?

Q. Yes, you do.

Now, in reaching your opinion, your conclusion as to whatever measure of overhang or depressing effect there may be on the market, to what extent did you take into consideration selling in a series of transactions or selling at one time? In other words, did you assume that all the stock would be sold at one time?

A. You mean the General Motors stock? You are still talking about the time of purchase by General Motors? [fol. 2184] Q. Sir, I am talking about before we get into the purchase of stock by General Motors. You testified that the sale of General Motors stock pursuant to the provisions of a judgment in this case would overhang the market and would have a cloud on the market. I believe that was your testimony. In reaching this conclusion, did you assume that all of the stock would be sold at the same time, did you assume that it would be sold on a daily basis with regard to prevailing market conditions, or what were your assumptions?

A. I made no assumption as to how the marketing of the thing occurred. If it could all be sold at one time it would be wonderful because then it would be out of the way and the cloud would disappear.

Q. Well, let me then return to your testimony concerning the purchase of General Motors stock by General Motors, and I understood you to testify that in the event the purchases were made all at one time it would have perhaps some effect on the market, was that correct?

A. No, that is not what I answered. If you're asking me now if the General Motors bought all their stock for their company at one time, I said if the sale by trustees matched the purchase, there would be no effect on the market; if the General Motors bought all this stock in one week and the trustees sold none in the week, there would be an effect on the market. Conversely, if the General Motors bought none and the trustees sold all, there would be an effect on the market.

Q. You've also testified I believe that in your opinion the model changes which are followed by the automobile companies have an effect on the market price of the stocks of those companies?

A. Well, if you look back to a few months ago, General Motors was selling around 35 to 36, and steel was selling [fol. 2185] at 39, and it is well known that the steel companies were affected greatly by the prosperity of the motor companies. The steel company is now selling at 97, 98, and General Motors is selling at 50. Does that answer you?

Q. No, sir, I don't believe so.

Mr. Reycraft: I have no further questions.

Redirect examination.

By Mr. Horsky:

Q. Mr. Lowell, I have just one question I want to clarify as to one of the responses that you made to Mr. Reycraft's questions with respect to the purchase by General Motors of its own shares of stock.

Mr. Reycraft asked you, assuming that General Motors purchased a number of shares equal to those which the trustees under the Government plan would sell, would there be an effect on the market price of General Motors; and I think you said under those circumstances, if they were matched in time, there would be no effect, is that correct; essentially?

A. I think it's correct from the point of view of the daily market, but if you removed, as you would be doing, the potential buying power equal the amount of stock that General Motors was buying over a period, it would affect——

Q. That's the question I wanted to ask you. Were you assuming, in answering that question, that General Motors would not be affected in buying what it had always been buying for the past ten years, let's say, or were you assuming that they would add to their purchases an amount equivalent to the sales; and would the situation be the same on those two assumptions? Would you explain that?

A. It's not quite the same, because you're removing from [fol. 2186] both sides a potential support of the market by doing it that way.

Q. Would it be as significant in terms of the market to remove let us say the purchasing of two million shares a year as to add the supply of two million shares a year? Is there any difference in the effect?

A. Well, you're getting into—I don't think most people realize, and I am sure that the brokers that buy stock for the General Motors do it in such a way as not to have it known that they're buying, so as not to influence the market one way or another. I think, carefully spread out, the amounts that you're talking about, there would not be a great deal of change. I think the trouble is that removing that amount of support, you also under the Government plan would increase the sale of General Motors and there-

fore you'd have both sides weakened. You might have that result.

Q. Mr. Lowell, you testified in response to some questions of counsel for the plaintiff about the agency accounts in the Boston Safe Deposit Company, and I think you testified that in many of those accounts you have no power of investment, is that correct?

A. Yes, in agency accounts we often do not have the full responsibility the way we do in trusts.

Q. Now, you've given a 60-40 per cent figure in relation to trusts, I think, and you said that you might just reverse that—is my recollection correct about that applied to the agency account?

A. Yes.

Q. Now in the case of 75 per cent of the agency accounts where you do not have full investment powers, do you give investment advice?

A. In a great many.

Q. And in giving that advice, on the various assump-
[fol. 2187] tions that had been put to you this morning, would you give advice on the basis of the answers that you've given this morning with respect to investments?

A. Yes, but you see the fundamental difference is that in agency accounts—now, this is just a broad statement—you're dealing with people that are alive and they have a right to decide in their own mind. We might say, "You'd better sell," but they might say, "We don't care what you say;" but where you're dealing with trusts, we're carrying out the wishes of somebody that's gone before, and there is that distinction.

Q. You do give them advice in some of these cases?

A. Oh, yes.

Recross-examination.

By Mr. Reycraft:

Q. Mr. Lowell, returning to this question of General Motors purchases of its own stock, now, were you aware before this morning that General Motors purchased its own stock in the market?

A. Oh, yes.

Q. Were you aware of the quantities?

A. No.

Q. What now is your understanding of what those quantities are?

A. I don't know what the quantities are.

Q. Is it your opinion that these purchases have a supporting effect on the price of General Motors stock?

A. Every share that is bought, by whoever it is bought, has a tendency to support the market.

Q. So it has a tendency to lift the price upward?

A. I didn't say it had a tendency to lift it upward, I said it had a tendency to support the market. I imagine a good deal of those purchases by the General Motors brokers are made on a descending market and not on a rising market.

Q. Well, if you assume that shares of General Motors [fol. 2188] are sold, you say this puts a cloud on the General Motors stock market?

A. What?

Q. This puts a cloud over the market for General Motors stock?

A. The part that is unsold is the cloud.

Q. The selling itself does not have any effect on the market price?

A. What?

Q. Would the selling itself have any effect on the market price?

A. Oh, sure; oh, sure.

Q. A sale would affect the market price downward, whereas a purchase would not influence the market price upward, is that your testimony?

A. When you force a sale, it tends to put things down; when you force a purchase, it tends to put things up. If you have a choice of when you make your purchase, it does not necessarily put it up. If you have no choice of when you make your sale, it does have an effect of putting it down.

Q. Suppose you had the same choice as to when you made the sale, assuming the same quantity of stock to be sold as you had in making the purchase. Would you say that the upward and downward effects were equal?

A. I think that you'd have—and you've got a perfect right to take the assumptions that the seller is doing as good a job as I said the purchaser would do, and therefore the seller is selling on a rising market and it tends to limit the rise and the speed of the rise of the market to the ex-

tent that he brings in stock that would not otherwise be in the market.

Q. Just as the purchasers have a tendency to limit the decrease in the price of the stock; is that correct?

A. That's correct."

Mr. Reycraft: That is all.

[fol. 2189] Mr. Horsky: I should like, your Honor, to offer du Pont's Exhibits 42, 43 and 44.

Mr. Reycraft. No objection.

The Court: They are received.

(Said exhibits, so offered and received in evidence were marked defendant du Pont Exhibits 42, 43 and 44.)

Mr. Horsky: That concludes it, your Honor. General Motors will put in a few exhibits, your Honor, through a witness; and we have no objection to interrupting our case for that purpose.

OFFERS IN EVIDENCE

Mr. Barnham: With the Court's permission, we have just a few statistical exhibits, your Honor. Most of them won't even require a witness, because we have taken them up with the Government in advance. Over the noon recess I had these documents marked General Motors Exhibits 15 through 28 for identification. I furnished the Clerk with a book which contains now all of the exhibits which General Motors intends or expects to offer.

The last group is this group beginning with Number 15. Because of a slight change in order, we are temporarily skipping numbers 12, 13 and 14, and commencing here with 15.

General Motors Exhibit 14 for identification, your Honor, is merely a tabulation from the General Motors records of the number of shareholders of General Motors common stock each year, commencing with 1917 and going through 1958. We had in mind your Honor's remarks at the opening of the trial about the rights of the shareholders that [fol. 2190] might have intervened since and during the 30 years or in the years that have elapsed since du Pont made this purshase of General Motors stock.

I offer in evidence General Motors Exhibit 15.

Mr. Reycraft: No objection.

(Said exhibit, so offered and received in evidence was marked General Motors Exhibit 15.)

Mr. Burnham: General Motors Exhibit 16 for identification, your Honor, is merely a graphic depiction of the same information, starting with the first figure that shows in the lower left, which happens to be the 1918 figure of slightly over 2000 shareholders. It shows the increase in numbers of shareholders over the years.

I offer in evidence General Motors Exhibit 16 for identification.

Mr. Reycraft: No objection.

The Court: It may be admitted.

(Said document, so offered and received in evidence was marked General Motors Exhibit 16.)

Mr. Burnham: General Motors Exhibit 17 for identification, your Honor, is a breakdown as of last August, which is the last period for which we have it, of the types of stockholders of General Motors, as shown by the stock record books of General Motors. It shows men, women, estates, trusts and the like, all the way down the line, and is as nearly as we can get it from the General Motors stock record books.

I offer in evidence General Motors Exhibit 17.

Mr. Reycraft: No objection.

[fol. 2191] The Court: It may be admitted.

(Said exhibit, so offered and received in evidence was marked General Motors Exhibit 17.)

Mr. Burnham: General Motors Exhibit 18, for identification, again is a graphic depiction of the same information; we have lumped men, women and joint tenants, as individuals; we have lumped estates, trustees, custodians for minors as the smaller slice marked "A" on the pie chart, and so on down the line.

I offer in evidence General Motors Exhibit 18, your Honor.

Mr. Reycraft: No objection.

The Court: It may be admitted.

(Said document, so offered and received in evidence, was marked General Motors Exhibit 18.)

Mr. Burnham: General Motors Exhibit 19, your Honor, which I believe was a fold-out in there, your Honor, is taken from Government Exhibit 149, which is already in evidence. This breaks down the shareholders of General Motors by the size of their shareholdings, indicating something over 64 per cent of the shareholders hold only from 1 to 100 shares, roughly 15 per cent hold 100 to 200 shares, and so on down the line. The actual number of shareholders are shown in the left-hand column.

I offer in evidence General Motors Exhibit 19.

Mr. Reycraft: No objection.

The Court: It may be admitted.

(Said document, so offered and received in evidence, was marked General Motors Exhibit 19.)

[fol. 2192] Mr. Burnham: General Motors Exhibit 20, your Honor, is a compilation of material from several sources. In the record from the original trial there is——

I would like to state this before I explain this exhibit. Your Honor may recall that, over the objection of General Motors, there was introduced in evidence here by the Government a du Pont answer to interrogatories which showed for several recent years the dollar volume of sales by du Pont to General Motors. We objected to that, but it went in; and, since it went in, we consider this exhibit, which gives a little more detail—it shows the situation over the years—we consider it to be relevant.

The left-hand column, your Honor, which is headed, "Purchases From du Pont," for the early years came from the record of the original trial; for the recent years it came from that answer to interrogatories that was put in evidence; for the intervening years, roughly 1948 to 1953, I think, the material or dollar figure was furnished by du Pont as the figure of sales to General Motors. I understand the Government has not questioned the accuracy of those figures, and that we need not put a witness on the stand.

The next column, which shows total payments by General Motors to suppliers for materials, services, and the like, came from the General Motors books, and was compiled by General Motors. Again, I understand that the Govern-

ment has no objection to the accuracy of the figures therein stated.

The last column shows the per cent that the General Motors purchases from du Pont were of its purchases from all sources of the purchases of supplies, materials, services, and the like.

I offer General Motors Exhibit 20 in evidence, your Honor.

[fol. 2193] Mr. Reycraft: I object, your Honor.

Your Honor will recall that the Government did urge the Court to take into account information relating to trade relations between du Pont and General Motors, and the Court ruled that it would not be relevant. I think that this exhibit should not be received, and there are several other exhibits which Mr. Burnham is about to offer which fall into the same category, and I think the same ruling should apply with respect thereto.

The Court: Which Government exhibit did you refer to when you said you are offering this because of the admission of a certain Government exhibit? What number was that?

Mr. Burnham: Government Exhibit No. 179, your Honor, at transcript page 1413, you will find the end of Mr. Tierney's argument when he said this evidence could have no relation to anything other than an attempt to prove another Section 7 case and so on. Your Honor sustained the objection.

Then, at the next page, 1414, I believe it is, Mr. Cowen said, "I think there is one thing that should not be excluded——" You see, we were discussing then the whole range of various exhibits having to do with trade.

Mr. Cowen said, "I think there is one thing that should not be excluded, and that is the total dollar sales between du Pont and General Motors."

The Court: Yes, I recall it now.

Mr. Burnham: That was admitted in evidence. This is offered, your Honor, for the purpose of showing how the figures which the Government did introduce for the recent years compare with figures for earlier years.

[fol. 2194] Mr. Reycraft: Your Honor will recall that Mr. Cox argued that in the event comparisons of this type were put into evidence that it would require the introduction of evidence by du Pont to show that there were no new lines

of commerce involved, no section 7 violation. While we didn't agree with that argument, we think the same ruling should apply to these exhibits.

The Court: No, I think in view of the Government exhibit being received, this one should be received as well, so the objection is overruled.

(Said exhibit, so offered and received in evidence was marked General Motors Exhibit 20.)

Mr. Burnham: Thank you, your Honor.

General Motors Exhibit 21 for identification is merely a graphic depiction of that same thing.

Your Honor will recall that Exhibit 20 showed the percentage that the General Motors purchases from du Pont bore to all of General Motors purchases, and this shows across the very bottom, that figure ranging from about one and a half per cent to less than one per cent, and the artist has blown up that range from zero to three per cent in the insert.

It is merely a graphic depiction of what is already in evidence. I offer General Motors Exhibit Number 21 in evidence.

Mr. Reycraft: I have the same objection, your Honor.

The Court: Overruled.

(Said exhibit, so offered and received in evidence was marked General Motors Exhibit 21.)

[fol. 2195] Mr. Burnham: General Motors Exhibit No. 22, your Honor, takes this same question of the General Motors purchases from du Pont, only it relates solely to the year 1958, and it shows the breakdown of the sales dollar received by General Motors, what per cent went to suppliers other than du Pont, what per cent went to du Pont, what went to employees, what went for taxes, and the like.

The graphic depiction of that is General Motors Exhibit No. 23 for identification, showing, as someone said, this is the hangnail chart. It shows what went to du Pont out of General Motors sales dollar.

I offer General Motors Exhibits 22 and 23.

Mr. Reycraft: Same objection, your Honor.

The Court: Overruled.

(Said documents, so offered and received in evidence, were marked General Motors Exhibits Nos. 22 and 23.)

Mr. Burnham: Now, with respect to the next one, I am not sure whether they want a witness. I was first told with respect to General Motors Exhibit No. 24 that we need not produce a witness, if we made the underlying material available, and I advised Government counsel a week ago that it was available.

This is compiled from Standard and Poor's weekly indices of stock prices, and it merely shows for various industry groups the percentage change in the stock prices between 1946 and 1958. Also included there is Standard and Poor's figure for the entire 425 industrials, which Mr. Boni used on many occasions, and the general movements figure.

[fol. 2196] I offer General Motors Exhibit 24.

Mr. Andrews: Your Honor, we do desire a witness. However, before a witness is produced, I wonder if counsel for General Motors would explain the relevancy of this exhibit.

Mr. Burnham: This is offered merely because Mr. Boni used the 425 industrials and the 500 industrial averages, or the 500 stock price averages, in many of his exhibits. The sole purpose of this is to show that different industries and different companies have different experiences, and the average is nothing more or less than an average, and that is the purpose for offering this exhibit.

Mr. Andrews: Of course, for clarification, Mr. Boni stated it was a Dow-Jones average——

Mr. Burnham: He said Standard and Poor's.

Mr. Andrews: I mean Standard and Poor's average.

Mr. Burnham: Do I understand Government counsel want a witness on this?

Mr. Andrews: Yes, we do want a witness.

Mr. Burnham: Then, your Honor, I call to the stand Mr. Frederick W. Leich.

Frederick W. Leich, called as a witness on behalf of General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Burnham:

Q. Will you state your name and address, Mr. Leich, please?

A. Frederick W. Leich; 821 Solar Lane, Glenview, Illinois.

[fol. 2197] Q. What is your occupation, Mr. Leich?

A. I am manager of the statistical department for Glore, Forgan & Company in the Chicago office.

Q. Mr. Leich, I hand you General Motors Exhibit No. 24 for identification.

Was that exhibit prepared by you at the request of General Motors?

A. It was.

Q. And from what source was that material compiled?

A. From Standard and Poor's statistical indices.

Q. The regularly published indices of Standard and Poor?

A. Yes.

Mr. Burnham: Your Honor, I offer in evidence General Motors Exhibit No. 24 for identification, as General Motors Exhibit No. 24.

Mr. Andrews: I have a few questions, your Honor.

The Court: Very well.

Cross examination.

By Mr. Andrews:

Q. Would you tell me when you were asked to prepare this particular exhibit by General Motors? At what time?

A. I believe it was some time last November or December.

Q. I see. I noticed where you have chemicals, it says it excludes du Pont. Would you tell me where du Pont would fall if it was included in this exhibit?

A. I don't recall.

Q. Under your classifications electrical equipment and office equipment, could you tell me in which of these two IBM Corporation would fall, in which of these classifications?

A. Office equipment.

Q. And all of the information obtained hereon was obtained from Standard & Poor's?

A. Except for the General Motors price. General Motors [fol. 2198] price on here was taken as just the price of General Motors stock.

Q. Could you tell me why du Pont was excluded from the chemicals?

A. It is just that they happened to publish the index in both ways, and that was involved in this case, so I thought I would take the chemicals without it.

Q. They list it including du Pont and excluding?

A. And without.

Q. Why did you decide to introduce it without? It seems to me perhaps it would be more relevant to have included it, or at least list it separately.

Mr. Burnham: I think the witness has already stated why he excluded it, your Honor. I think the witness has been asked and has answered.

The Court: Overruled.

By the Witness:

A. I would disagree. It would seem to me that the thing to do if you were going to put the price in would be to put du Pont in separately and have the other index without du Pont. Perhaps I should have put du Pont in as well as General Motors.

By Mr. Andrews:

Q. That was going to be my next question. Why did you put in General Motors and not du Pont?

A. I was asked to do this by General Motors, and I didn't put in du Pont—no particular reason.

Mr. Andrews: That is all.

Direct examination.—(Continued)

Mr. Burnham: I renew the offer, your Honor.

The Court: It is admitted.

[fol. 2199] (Said document, so offered and received in evidence, was marked General Motors Exhibit 24.)

Mr. Burnham: Your Honor, I have several more exhibits

that the Government has said they wanted a witness for, and Mr. Leich I would like to use for that also.

The Court: All right.

Mr. Tierney: Maybe they have changed their minds.

Mr. Burnham: Do you still wish a witness for the other exhibits?

Mr. Andrews: Yes, we do.

By Mr. Burnham:

Q. Mr. Leich, do you now have in your hand General Motors Exhibit No. 25, for identification?

A. I do.

Q. That is the exhibit, entitled, "Net Purchases (Net Sales) of General Motors Common Stock by Institutions January 1953 to October 1955."

A. Yes.

Q. Does that exhibit show information which is contained in the staff report to the Committee on Banking and Currency, United States Senate, which report is entitled, "Institutional Investors and the Stock Market, 1953 to 1955".

A. Yes, it does.

Q. Are the various figures which are shown on this exhibit figures which appear on pages 147 and 225 of that Senate staff report?

A. They are.

Q. Have you checked that, Mr. Leich?

A. Yes, I have.

Mr. Burnham: Your Honor, I offer in evidence General Motors Exhibit No. 25.

I might say that that is the same Fulbright Committee Report that was used by one or more of the Government witnesses, including Mr. Boni.

[fol. 2200] Mr. Andrews: Your Honor, first of all, as I recall it, the only witness of ours that gave any evidence from this particular Committee Report was Doctor O'Leary, and he gave it as to insurance companies. Doctor O'Leary was in charge of the preparation of that data for the Committee.

Mr. Burnham: I beg your pardon. Mr. Boni had at least two exhibits prepared from this. He had the docu-

ment in his briefcase on the stand and referred to it. I believe the record shows that fact.

Mr. Andrews: Well, if you will get the exhibit, I would like to see which exhibit you are referring to because, as it stands right now, this is obviously hearsay from this witness.

He did not prepare this. He just stated he went to page so and so of the Fulbright Committee Report and extracted these figures.

The Court: Do you have any questions of this witness?

Mr. Andrews: I do have some questions, your Honor.

Cross-examination.

By Mr. Andrews:

Q. Would you tell me, referring to the footnote of 210 corporations, and so on, could you tell me what proportion, say, the first one you have, 20 open end investment companies, what proportion of all the investment companies are represented by those 20?

A. I would not know exactly. It is probably a small proportion.

[fol. 2201] Q. In other words, there were many more others than what is shown here?

A. Yes.

Q. Do you have the same answer for the rest of the entities shown there, closed end investment companies, corporate investment funds it just does not include all pension funds?

A. I would assume that 30 was not a large number.

Q. And as to the life insurance companies?

A. That might be larger?

Q. For casualty and surety insurance companies, what proportion was included?

A. I have made no analysis of the size of the sample involved here.

Q. Did you do anything more than just copy these figures from this particular report? Did you study the report to see what this was supposed to represent?

A. No, I did not.

Mr. Andrews: I renew my objection, your Honor. I think it is strictly hearsay evidence of this witness.

Mr. Burnham: Your Honor, in the very brief moment I had, Government Exhibit 341, which was Exhibit IV, introduced through Mr. Boni, is headed, "Institutional Purchases and Sales of Common Stock, January 1953 through October 1955," and shows exactly the same breakdown of companies, but doesn't tell how many were included. It says, "Source: Institutional Investors and the Stock Market, 1953-1955, Dated December 28, 1956, Tables 8 and 9, Pages 12 and 13."

We can show that that is this exhibit. There is one other by Mr. Boni which we were not able to find, which purports to show the same information for General Motors taken from exactly the same Senate staff report.

[fol. 2202] Therefore, I renew my offer.

Mr. Andrews: Your Honor, I was just asking Mr. Burnham if he made an objection to that exhibit when it was offered. I am objecting now to the exhibit. The mere fact that it went in, I don't know whether they objected, but I think it is strictly hearsay evidence coming from this witness, and I object on those grounds.

The Court: Well, the objection is overruled.

(Said exhibit, so offered and received in evidence was marked General Motors Exhibit 25.)

Direct examination.—(Continued)

Mr. Burnham: On our next exhibit, General Motors Exhibit No. 26 for identification, I was informed that Government counsel would not require a witness, but I wish to keep Mr. Leich here because I need him for the next one.

Exhibit 26 was taken from the records of General Motors Corporation.

It shows, insofar as those records reveal, the institutional holdings of the common stock of General Motors Corporation. But as the footnote shows, it relates to the listed group but it does not include investment trusts, holdings of employee benefit funds, or other types of stock which are held in nominee names.

The Court: Is there any objection to 26?

Mr. Andrews: I just have some questions, your Honor.

Mr. Burnham: Mr. Leich had nothing to do with this.

[fol. 2203] I was told we did not need a witness for this.

This was not prepared by Mr. Leich. It came from the files of General Motors.

Mr. Andrews: I thought we did require a witness. I do have some questions I would like to ask.

Mr. Burnham: Well, you may cross examine the witness within the scope of the direct. On March 20th I confirmed the phone call to Mr. Owens and this was one that I listed, where I said, "Paul advised me we need not produce a witness or underlying data for the following exhibits——"

And this is the second one on that list.

Mr. Andrews: Well, did this witness prepare this exhibit?

Mr. Burnham: No, he did not.

Mr. Andrews: He did not?

Mr. Burnham: He did not. I offer in evidence General Motors' Exhibit No. 26, your Honor.

Mr. Owens: No objection.

The Court: It is received.

(Said document, so offered and received in evidence, was marked General Motors Exhibit No. 26.)

Direct examination.—(Continued)

By Mr. Burnham:

Q. Mr. Leich, do you know of any source that compiles information contained in the annual reports of investment companies?

A. Yes, Vicker's Associates publishes reports of the favorite 50 stocks of investment companies.

Q. And at my request did you examine those Vicker's reports which are prepared annually?

A. Yes, I did.

[fol. 2204] Q. And was an exhibit prepared showing the result of that examination which you made of those?

A. Yes, it was.

Q. Is General Motors' Exhibit No. 27 for identification that compilation of data, Mr. Leich?

A. Yes.

Q. Everything which appears on that was taken from the Vicker's reports, was it not?

A. Except for the calculations in the final column, the percentage calculation in the third column, and the calcula-

tion of the adjusted number of shares in the third column from the right.

Q. The underlying data from which those calculations were made, however, was taken from the Vicker's reports?

A. It was.

Q. And have you checked those calculations to be sure they are correct?

A. Yes, I have.

Mr. Burnham: Your Honor, I offer in evidence General Motors Exhibit No. 27 for identification, showing the General Motors stock held by investment companies.

Mr. Andrews: I have one question, your Honor.

Cross-examination.

By Mr. Andrews:

Q. Again, could you tell me when this exhibit was prepared by you?

Mr. Burnham: I do not believe he said it was prepared by him. He said he made a study and he checked this exhibit. As a matter of fact, this exhibit was prepared by my secretary.

Mr. Andrews: Would you mind if he answers the question, Mr. Burnham?

[fol. 2205] By the Witness:

A. Will you repeat the question, please?

By Mr. Andrews:

Q. As I understand it now, you did not prepare this exhibit?

A. I prepared the original data from which this was typed.

Q. But this exhibit itself was not prepared by you? I am referring to General Motors Exhibit 27.

A. Well, it seems to me I have answered that.

Q. Well, is your answer yes or no?

A. That the data, this data was calculated and prepared. I did not type the exhibit.

Q. Did you prepare it for typing as it is here, lay out

the format, and so forth? In other words, the exhibit as it appears here, did you prepare this exhibit?

A. Yes.

Q. Could you tell me what date you prepared it?

A. The original data through '57 was prepared sometime in November and December, and the 1958 data were added——

Q. November and December of '58?

A. Yes—were added early this month, I believe. I do not remember the specific date.

Q. Now, referring to footnote B, where you have adjusted for 2-for-1 stock split and for 3-for-1 stock split in 1955, who made that calculation? Was that you?

A. I did.

Mr. Andrews: I have no further questions.

The Court: All exhibits offered are received in evidence.

Mr. Burnham: Thank you, your Honor.

There is one more in this group. May I cover that? It is General Motors Exhibit No. 28.

[fols. 2206-2207] Direct examination.

By Mr. Burnham:

Q. Mr. Leich, was that prepared under your supervision—I am sorry, at your direction?

A. Yes.

Q. And what does that show, Mr. Leich?

A. That shows the same data that was contained in Exhibit 27 except in graphic form. The red bars below the line show the decreases in stock holdings from year to year and the blue bars above the line show the increases.

Q. And the three lines at the bottom of the page show—the last line shows the percentage of companies in the survey which held General Motors stock?

A. Yes.

Mr. Burnham: I offer General Motors Exhibit 28 in evidence, your Honor.

Mr. Reycraft: No objection.

The Court: It is received and all prior offered exhibits are received that were offered in this group.

(Said documents so offered and received in evidence were marked General Motors Exhibits 27 and 28.)

Mr. Cowen: Your Honor, might we inquire of counsel either today or tomorrow morning at a pretrial conference as to what the conclusion of their schedule would be for the next several days and for the forthcoming week?

The Court: We will discuss that tomorrow morning.

Mr. Cowen: Thank you.

(Whereupon an adjournment was taken in the trial of the above-entitled cause until Wednesday, March 25, 1959 at ten o'clock a.m.)

[fol. 2208]

Transcript of Proceedings of March 25, 1959

The Clerk: Case on trial.

The Court: Proceed, Counsel.

Mr. Horsky: The du Pont Company calls Mr. Moses.

William B. Moses, Jr., called as a witness on behalf of the defendant E. I. du Pont de Nemours and Company, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Horsky:

Q. Will you state your full name to the reporter, please?

A. My name is William B. Moses, Jr.

Q. And your business address, Mr. Moses?

A. My business address is 200 Berkeley Street, Boston, Massachusetts.

The Court: Will you speak a little louder, please? What is the answer?

The Witness: Yes, sir. My business address is 200 Berkeley Street, Boston, Massachusetts.

By Mr. Horsky:

Q. And your home address, sir?

A. My home address is 86 Main Street, Concord, Massachusetts.

Q. What is your present position, your present official position?

A. I am a Trustee of Massachusetts Investors Trust, and a Director and member of the Investment-Management Committee of the Massachusetts Growth Stock Fund.

Q. Would you give us briefly your educational background, Mr. Moses?

A. I graduated from Yale University in 1935 with a B.S. degree cum laude. In addition to that, I attended the [fol. 2209] Advanced Management Program of the Harvard Business School in the Fall of 1952.

Q. Prior to joining the Massachusetts Investors Trust and the Massachusetts Investors Growth Stock Fund, what was your previous business experience?

A. Following graduation in 1935, I worked for the investment banking firm of Lehman Brothers in New York City until 1941. I was in their investment advisory service as a security analyst first, and later both as a security analyst and account supervisor.

Q. From there you went to the Massachusetts Investors Trust?

A. In 1941 I joined the Massachusetts Investors Trust as a member of their Investment Research Department, and in 1953 I became a Trustee and also in that same year a Director of the Growth Stock Fund.

My particular responsibility as a Trustee is to administer the Investment Research Department which is maintained by both funds.

Q. Tell us a little bit about the Massachusetts Investors Trust. When was it organized, Mr. Moses?

A. The Massachusetts Investors Trust was organized in 1924, and it is the oldest open-end investment company or, as they are better known, mutual fund in the country.

Q. What is an "open-end mutual fund"?

A. An open-end mutual fund is a company which sells its own shares to the public, usually at net asset value, plus a sales charge, and with the proceeds therefrom it invests in a diversified list of securities.

Another feature of the open-end fund is that it stands ready to redeem any shares that a stockholder wishes to sell.

Q. Buy them back, you mean?

[fol. 2210] A. Buy them back. In its simplest form, it is the medium whereby the investor can invest in a diversified list of securities under professional guidance and at reasonable cost, and with no marketability problem.

Q. How big, approximately, is the Massachusetts Investors Trust?

A. At the present time Massachusetts Investors Trust is nearly $1,500,000,000 in size, which I believe makes it the largest open-end investment company in the country at the present time.

Q. How many shareholders does it have?

A. We have approximately 200,000 shareholders at the moment.

Q. Do all mutual funds have the same type of investment policies?

A. There are a great many mutual funds, each with a different investment policy.

Q. What is the policy of the Trust?

A. The policy of the Trust is to invest almost entirely in common stocks believed to be of high or improving quality except for minor amounts of working cash or short term notes.

Q. You said you were a trustee of the fund. How many trustees are there?

A. The trust is managed by five trustees, of which I am No. 4 in order of appointment.

Q. I should have said the Trust rather than the fund. I am speaking of that. Do they manage the Trust?

A. They manage the Trust, and they are assisted in this by an advisory board of five people and an investment research staff of seven men.

Q. Is this a full-time job with the trustee?

A. It is a full-time job with the trustees, and all decisions to buy or sell securities as well as all other investment decisions or any administrative ones, for that matter, are decided by that majority vote.

[fol. 2211] Of the trustees?

A. Of the trustees.

Q. You said you have an investment research department. Would you describe it, briefly?

A. This department, which as I said before, is under my particular jurisdiction, consists of seven security analysts or, as we call them, industry specialists.

They are all skilled and trained in the work of analyzing and following industries, and the companies within them, from the investment standpoint.

Each man is assigned a few industries to follow and has complete responsibility for whatever takes place in those groups and in the companies, not only the companies which we own, but any which we might think would be eligible for investment.

He is charged with making recommendations to the trustees to buy, sell, or hold the stocks in which we are interested. However, as I said before, the final vote or decision is with the trustees and not with the research men.

Q. You said you had an advisory board. What is the nature of that board, Mr. Moses?

A. This advisory board of five men includes five of the leading people in business and finance in the City of Boston.

They meet with the trustees once a week, at which time the industry is reviewed by one of the industry specialists. The advisory board is asked to pass judgment on what we have done in that industry, make any comments on it whatsoever, or to bring in any information from their outside business contacts that would be of value to the trusts.

But as opposed to a board of directors, the advisory board has no vote. It acts simply in this advisory capacity.

[fol. 2212] Q. We had read in court yesterday the deposition of Mr. Ralph Lowell. He is one of the advisory board, is he not?

A. Mr. Ralph Lowell is one of the advisory board, and at the moment the senior member.

Q. Now, let me turn from the Massachusetts Investors Trust to the Massachusetts Investors Growth Stock Fund. How big is that?

A. At the present time the Growth Stock Fund is approximately $250,000,000 in assets.

Q. What is the investment policy which distinguishes the Growth Stock Fund, from the Trust?

A. It is similar to the Trust in that it is invested entirely in common stocks, but the policy is to invest only in those industries or stocks which are believed to have above average prospects for growth and development. The emphasis is on growth as opposed to stability or income.

Q. How is the Growth Fund administered, Mr. Moses?

A. The five trustees of the Trust constitute five of the seven directors of the Growth Stock Fund, and they also represent the investment management committee of the fund which, as in the case of the trustees, make all investment decisions by majority vote.

Q. Do you use the same investment research department?

A. It is the same investment research department for both funds with the Growth Stock Fund paying a fee to the Trust based on the relative size of the assets. They also have the same advisory board.

Q. The same people?

A. Same people.

Q. So Mr. Lowell is a member of the advisory board of the Growth Fund as well as the Trust?

A. That is right.

Q. Now, how much money does the Trust have available for investments in money, each year?

[fol. 2213] A. Last year, 1958, the Trust took in approximately $61,000,000 in new money. That is, the excess of the proceeds from the sale of new shares over the money paid out for shares redeemed. This compares with approximately $57,000,000 in 1957.

Q. Now, do you have purchases of common stocks other than with new money that comes in?

A. There is a certain amount of portfolio turnover or transactions taking place every year.

Q. Can you give us some idea of the magnitude of that?

A. Last year the Trust sold 26 different companies for a total value of 56 million dollars, and in turn purchased 59 other companies for a total expenditure of one hundred ten million dollars.

Q. How would the growth fund be in answer to the same question? What would it do?

A. The new money taken in by the growth stock fund last year was $35,700,000, or slightly more than the $35,200,000 of the previous year. It also sold 19 different stocks for a total value of proceeds of $7,700,000, and in turn purchased 46 other issues at a total cost of $37,500,000.

Q. Turning to the Trust, the Massachusetts Investors Trust, can you give us some idea of the factors which lead you to buy or to sell a particular common stock in general?

A. Well, as I mentioned previously, we assign to each member of our Investment Research Department a small group of industries for which he has complete responsibility for analyzing and studying every development that takes place in it. This work involves such well-known factors as studying the industry's basic position, the caliber of the management, the financial position, financial requirements of the company, the trend of sales, of profit margins, [fol. 2214] earnings, backlog of orders, labor situation, competitive factors.

There are a host of others. He obtains this information primarily by personal contact with the top executives of every company which are invested, including a great number of others which we also follow as being potentially eligible for investment.

This work is supplemented by what I call the usual statistical services—Standard and Poor's, Moody's, all the data that is published by the companies themselves, a vast number of trade journals and publications.

We also receive a great deal of help from the commercial banks, investment banking houses and brokerage firms. Out of all this data it is the analyst's job to try to determine to the best of his ability what the earnings and dividend prospects for the particular company are, and then in turn, and what is perhaps the hardest job of all, is to relate these findings to the price of stock.

It is his responsibility, if he feels on final analysis, that a particular stock is attractively priced relative to these earnings and dividend prospects, he should recommend its purchase.

Conversely, if it appears overvalued relative to the prospects, or if there is any other factor—perhaps there is some deterioration in the industry or the company itself—again it is his responsibility to recommend its sale.

Each of these recommendations is transmitted to the trustee, usually in writing, and after appropriate discussion with the man a vote is taken and action is taken by us on a majority vote.

Q. And I take it that as trustees you consider the same [fol. 2215] factors you ask him to consider in making his recommendations, in making your judgment?

A. I do not believe I understand.

Q. Your judgment is based on the same factors that you have outlined as being important?

A. Yes, our analysis in the light of his analysis in discussing all the factors he has determined.

Q. That is right.

A. He has to write up all these interviews in some detail.

Q. Well, once you decide to buy or to sell a common stock, Mr. Moses, how mechanically or physically does the trust take care of this?

A. The buying and selling of our portfolio securities is conducted through a large number of the leading brokerage firms and a greater part of it is conducted on the New York Stock Exchange.

When the trustees have voted to buy a security, this vote is transmitted to our—what we call our market specialist, a Mr. Thompson, or to his assistant, and he immediately places a part of this order, say for several thousand shares, with a broker to buy or sell, whatever the case may be.

When that broker has completed his order, another few thousand shares go to another broker, and so on, until the whole transaction is done. Sometimes we, we the trustees, will set limits, that is, prices above which Mr. Thompson cannot pay for the stock, or below which he cannot sell a stock.

In the absence of specific limits such as these, he may set his own limits or he may simply use his own discretion.

In any event, the important thing is that we make a major attempt to avoid influencing the market in any way possible or whatsoever as a result of our transactions.

Q. Is it customary for you to put a time limit on how [fol. 2216] soon Mr. Thompson has got to do this?

A. We set no time limit on executing transactions.

Q. In your experience, Mr. Moses, has the trust ever had any trouble in buying General Motors stock at about the market price?

A. In our experience we have had no trouble in buying whatever amounts of General Motors we have wanted within a reasonable period of time at approximately the then-prevailing market price.

Last September, for example, we purchased 25,000 shares of General Motors on one particular day. I believe it was Friday, September 19th. We bought 15,000 shares through

one broker at a price of $46, and on the following Monday the other 10,000 shares at $46¼.

Q. Now, I will hand you, Mr. Moses, a document which has been marked for identification as du Pont Exhibit 46. Would you state what this represents?

A. This represents all the transactions by Massachusetts Investors' Trust from 1955 to 1958 in General Motors common stock. It shows the date of the trustees' vote and the amounts that were voted, for either buying or sale, the date of the individual transactions, the number of brokers to whom these orders were executed, the volume that each one—for each day, or each day's volume is shown, and the price range, the high and the low of the transaction.

Q. Now, I note from an examination of this du Pont Exhibit 46 for identification that after—well, from December, 1956 through 1957 you had been consistently selling General Motors stock and then after a lapse of about a year, you bought 25,000 shares.

Could you tell us what led you to make that purchase in '58?

A. Well, it may seem strange, but we bought Gen- [fol. 2217] eral Motors last September, in view of this litigation, and in view of the Government plan. We knew that the plan existed. As a matter of fact, it came into many of our discussions. But although it may be a mistake in investment judgment, we just could not believe that any such plan as the Government's, so drastic and far-reaching in its consequences, would have ever taken place. We may be wrong in that respect.

Other considerations were that at the time the stock market was moving towards new highs, attractive bargains were, it seemed, a little bit fewer than usual. General Motors had weathered the 1958—the poor year in 1958 in a good fashion and appeared to have excellent prospects for 1959, and it offered above average yield on a seemingly secure dividend.

Q. The last item on this sheet, Mr. Moses, is the purchase that you spoke about previously of 25,000 shares.

Did I understand you to say that the probability is that Mr. Thompson told a broker to buy 15,000 shares on September 19th?

Mr. Owens: We object, your Honor, unless the witness knows as to what happened. His speculation on what the prospects are doesn't appear to be——

The Court: He can only say what he knows of his own knowledge.

Mr. Horsky: That is correct.

The question was not properly phrased. I will rephrase it.

By Mr. Horsky:

Q. Would you address yourself, Mr. Moses, to the last item, "Buy 25,000 shares," and tell me again what, so far as you know, did actually happen with respect to that pur-
[fol. 2218] chase?

A. On the first day, Friday, 15,000 shares were purchased by the one broker. Actually, it was Paine-Webber. And the second day, on Monday, one broker was Dean Witter, but I don't know whether Mr. Thompson had approached other brokers beforehand or not. I doubt that that would be necessary in the case of General Motors. But it is recorded in our records, which I have as one transaction by one broker.

Q. The figure in the first column on the left, "Buy 25,000, 9-19-58" indicates that your decision was on that day—your decision to buy was taken on that day, as trustees, is that right?

A. That is right.

Q. Did you transmit that decision to Mr. Thompson the same day?

A. The votes to buy such securities as in this instance are transmitted immediately to Mr. Thompson. That is my responsibility, and, in my absence, it would be one of the other trustees'.

We have a form whereby the vote is recorded, who is for and against; it is given to him, and he starts in the market right away; there is no delay. There is complete flexibility of action.

Q. And on the same day that you voted, he acquired 15,000 shares?

A. That is right.

Q. And September 22nd is, did you say the following Monday?

A. The following Monday—the other 10,000.

Q. Now do you have trouble purchasing du Pont shares, Mr. Moses?

Let me hand you, before you answer that question, another document which has been marked for identification as du Pont Exhibit 45.

Will you state what this represents?

A. This is similar to the sheet on General Motors. It [fol. 2219] shows all the transactions of the trust in du Pont since 1955, the date of the vote, the individual days of the transactions with the number of brokers involved, the volume on that day. That is the amount we bought or sold and the price range within which we bought or sold.

Q. Do these two exhibits taken together, Mr. Moses, suggest that you proceed more slowly in purchasing or selling du Pont than with respect to General Motors?

A. Well, du Pont is a higher priced stock and, with fewer shares outstanding, does not have, in my view, the marketability that General Motors does; and it takes a little longer for us to complete a transaction in du Pont as compared to General Motors and within somewhat wider price limits.

Q. Now what is the present holding of the Trust of General Motors? Do you have those figures?

A. At the present time the Trust owns 700,000 shares of General Motors, with a present market value of approximately $32,000,000 and comprising about 2.4 per cent of the total assets of the Trust.

Q. How does that compare, Mr. Moses, with the maximum that the Trust has ever held in General Motors?

A. The peak holding of General Motors was in April, 1956, of 825,000 shares, and that amounted at that time to almost four per cent of the assets.

Q. Now, let us stay with the Trust for a moment.

How many shares of du Pont does the Trust have?

A. The Trust has 112,000 shares of du Pont, with a value at the present time of about $25,000,000, representing 1½ per cent of the assets.

Q. How does that compare with the peak holding?

A. The peak holding was 105,000 shares at the end of 1955.

[fol. 2220] Q. Is this the highest?

A. This is the highest. It had been decreased. It is the

previous peak. It had been decreased from 105, as I recall and built up back to 112,000.

Q. How about the Growth Stock Fund? How many shares of General Motors does it hold?

A. The Growth Stock Fund does not hold any General Motors stock because we had considered the automobile industry to be a cyclical one rather than a growth one; and, similarly, General Motors to be a cyclical stock rather than a growth stock, and consequently we do not own it.

Q. Has the Growth Stock Fund ever owned any General Motors, do you know?

A. I will answer it this way: The Growth Stock Fund, as it is now constituted,—the Growth Stock policy has been in effect since 1947—it has not owned General Motors since that time. Prior to that time, it was a different policy and a carbon copy of the big fund, it did own some.

Q. Does the Growth Stock Fund own any du Pont?

A. The Growth Stock Fund owns 17,000 shares of du Pont, with a value of approximately four million dollars, and about 1.6 per cent of the total assets of the fund.

Q. Now, I will address myself to the policy of the Trust. Is there any restriction which operates on the Trust which limits the amount which it can invest in any single stock?

A. Under the Investment Trust Act of 1940, neither the Trust nor the Fund can own more than 10 per cent of the outstanding voting securities of any company. In addition, if either fund owns over five per cent of the outstanding voting securities, it is deemed to be an affiliate of such a company. This gives rise to certain complications, so that we set a house policy, a policy that we shall not own more than five per cent of the outstanding voting securities of any one company.

[fol. 2221] In addition to this, there is another restriction that neither fund can invest more than five per cent of their assets, taken at market value, in the shares of any one company. There is still one further restriction, which is in our own policy statements which are on file with the SEC, that we cannot have more than 25 per cent of the assets invested in any one industry.

Q. Now, speaking generally, Mr. Moses, and not technically, if you can, what is the position of the funds with respect to Federal income tax?

A. Under the Internal Revenue Code, regulated investment companies, in order to avoid paying Federal income taxes, must pay out all of their taxable dividend income to their own stockholders. Similarly, they must pay out all—or the net capital gain arising from portfolio transactions during the year as a capital gain distribution.

Q. Realized capital gain?

A. Net realized capital gain must be paid out as a capital gain distribution, or the Trust itself would have to pay the capital gains tax. In this way the taxes on the ordinary income dividends are payable to stockholders according to their own individual tax brackets, and they pay a capital gain tax on the capital gain distribution. This sort of arrangement is under what we call the conduit theory, which visualizes the investment trust simply as a medium through which corporate dividends flow to the stockholders. If it weren't for this type of setup, we would have another layer of taxation. I suppose you could call it triple taxation, which would be disastrous.

Q. Now, just speaking generally, how would this system of taxation apply to the distribution of General Motors [fol. 2222] stock to the Trusts on the du Pont stock which they own, were the Government plan to be carried out?

A. The receipt of the General Motors dividends on our du Pont holdings would constitute taxable income to the trustees at the cost to du Pont of General Motors, a $2.10 cost to du Pont; and we would have to pay out either to our own stockholders to avoid paying income tax ourselves —we would have to pay out either the shares of General Motors or the cash equivalent of the dividend. In other words, we pass the tax along to the stockholders.

Q. The tax would not be borne by the Trust or by the fund; it would be borne by your stockholders?

A. It would be borne by the stockholders, and I think it is probably appropriate to emphasize that any impact or burden, whether it is a tax one or market impact is not borne by the Trust or by us as management, but it is borne by the stockholders. We, both the Trust and the Growth Stock Fund, are simply two entities on the books of General Motors and du Pont, and yet, as I said earlier, the Trust has 200,000 shareholders, and the Growth Stock fund has about 69,000 shareholders, and they are the ones who would

feel the impact, whatever it may be, of any adverse development.

Q. Have you read the Government's plan proposed in this case, Mr. Moses?

A. Yes, I have.

Q. Would you briefly state what you regard as the essential features of the plan, so we would be sure we are talking about it with the same things in mind?

A. Well, in its simplest terms, the Government is asking that du Pont distribute these 63 million shares of General Motors which it owns and also that Christiana get rid of its 535,000 shares, I think——

[fol. 2223] Q. 535,500 shares.

A. 535,500 shares over a ten-year period. Of the 63 million shares, the 20 million that would go to Christiana, Delaware, and their stockholders would be turned over to a trustee who would be charged with selling it, distributing it over the ten-year period. I understand you wouldn't have to do it one-tenth every year, but would pick his own timing, but would have it all completed at the end of ten years.

The other 43 million shares would be distributed as dividends to du Pont stockholders, one-tenth each per year for a ten-year period.

Q. Now, let me ask you, considering that plan, to assume with me for the moment that that plan would be ordered by this Court and put into execution.

Assume also, Mr. Moses, if you will, for the moment, that in carrying out its responsibilities under the plan, that du Pont distributes the General Motors stock to its stockholders other than Christiana, Delaware and the stockholders of Delaware in addition to its regular tax dividend.

Now, on those assumptions, would you be inclined to recommend the purchase of additional stock in General Motors by the Massachusetts Investors Trust?

A. Speaking for the Trust, it would depend on the price of the General Motors taken in conjunction with the prospects at that time for the automobile industry in general and for General Motors in particular.

It would also depend on the price relative to the stock market as a whole, and to whatever avenues of investment are open to the Trust.

As for the Growth Stock Fund, we would not buy any

General Motors for the reasons I stated earlier, that we consider the stock from the growth standpoint.

[fol. 2224] I think the best answer I could give you is that there would undoubtedly be some price at which we would buy more General Motors, but feeling as I do about the impact of the Government plan, I think this price would be substantially lower than it is now, at least on a relative basis, relative to the market as a whole.

Q. I take it from your answer that on the assumptions that I have given to you, your opinion would be that the effect of the Government plan would be to depress the price of the General Motors stock on the market?

Mr. Owens: He hasn't testified to that, as I understand it.

Mr. Horsky: I will ask him that question.

By Mr. Horsky:

Q. Would it be your opinion on the assumptions I have given you that the Government plan would depress the price of General Motors stock below that which it would have absent the plan?

A. I believe that it would depress the price of General Motors stock. However, there is one thing I want to make clear, and that is, in talking about price, I am not referring to the actual dollar value such as it is today, about $46.00 a share, so much as I am to the relative price, the price relative to stocks of similar quality, to other automobile stocks or the stock market as a whole.

Under a host of factors, many of which you are familiar with, general business conditions, interest rates, money supply, foreign and political developments, the basic level of the market is constantly changing, and individual stocks are affected.

I can only say I feel the price of General Motors would [fol. 2225] be lower than what it would otherwise be if the Government plan were not in effect. It would be lower, I think——

Mr. Owens: If your Honor please, I would like to know if this man is expressing an opinion, as I understand it, an analysis of the market in the future based on various conditions and assumptions. I want to know if he is expressing an opinion, as he appears to be now, or whether Mr.

Horsky is offering him as a market analyst with respect to trend of future prices based on various assumptions.

Mr. Horsky: I am offering him, sir, to testify as to what the Massachusetts Investors Trust and the Massachusetts Investors Growth Stock Fund will do with respect to future purchases and sales of General Motors in the event the plan goes into effect.

Mr. Owens: I take it, then, he is being offered as a market analyst in respect to that question since it involves that judgment, does it not?

Mr. Horsky: Well, you may draw your own conclusions.

Mr. Owens: I think we have to have it cleared up. If he is going to express opinion as to what will happen in the future, that is one thing. Now, when we had a parade of witnesses from stockholders who, I suppose you could find stockholders who would say they would sell if it rained, but here this man is a representative of an important investment trust in the country, and he is testifying as to the factors that will go into his judgment in selling or buying stock in the future.

That involves necessarily market analysis, and we are going to require the right to cross-examine him with respect to that question. Now, if he is going to testify as to [fol. 2226] opinions in that regard as to what will happen in the future, I think he is going to have to stand that type of cross-examination.

Mr. Horsky: Suppose you wait and see what he says?

Mr. Owens: Can you not tell us whether you are offering him as an expert with respect to investment policies of investment trust under certain assumptions?

Mr. Horsky: I have already told you, sir, and I will say it again, he is going to testify with respect to his opinion, his answer as to what Massachusetts Investors Trust and what Massachusetts Investors Growth Stock Fund would do with respect to the purchase or the sale of General Motors or du Pont if the Government plan were to be put into operation by this Court.

Mr. Owens: Well, he has already testified, as I understand it, your Honor, to the fact that that is going to depend on a lot of facts that have happened or will happen in the future and that he doesn't know about now, such as yield and earnings and the growth prospects of the industry, and so forth.

I think it is a gross imposition to have these witnesses come and testify as to their opinions as to what they will do in the future and not open them to cross examination on the facts if they go into their judgment in making the market analysis that they do with respect to the increased volume of the securities on the market.

Mr. Horsky: May I suggest that these questions [fol. 2227] would be more appropriate at cross-examination, your Honor.

The Court: Proceed.

Mr. Owens: I am objecting to his question now with respect to his opinion as to what they would do if the Government plan is ordered into effect.

The Court: Objection overruled. Proceed.

Mr. Horsky: I think you said, Mr. Moses, and let me summarize it—I hope I will do it accurately——

Well, will the reporter read back his answer, please?

(Record read.)

By Mr. Horsky:

Q. All right. Now, let me ask you this question, Mr. Moses: Assume just for the sake of simplicity that all these extraneous factors that you have talked about remain the same, and assume, if you will again, for the sake of simplicity, that until the court orders the Government plan into effect the price remains at 46.

On those assumptions, which I concede to you are arbitrary, but I am using them only for the sake of simplicity, can you tell us at what price level you would be willing to vote for further purchases of General Motors stock for the trust, even if the Government plan were put into effect?

A. Well, under those assumptions, that is, assuming that present stock market conditions and present business conditions remain the same, I would be willing to again recommend the purchase of General Motors for the Trust somewhere in the 35 to 40 area, as compared with the present price of 46.

Q. Can you tell us why?

A. At the price of 40 based on a seemingly secure——

[fol. 2228] The Court: Court stands recessed for five minutes.

(A recess was taken.)

The Court: Counsel may proceed.

Mr. Horsky: Would the reporter read the last question and answer, please?

(Record read by the reporter as follows:

"A. I would be willing to again recommend the purchase of General Motors for the Trust somewhere in the thirty-five to forty area as compared with the present price of forty-six.

"Q. Can you tell us why?")

By the Witness:

A. Well, at a price of $40, General Motors would yield five per cent on its basic $2 dividend rate. This would compare with a yield of three per cent on the invested assets of the Trust, that is, a yield of three percent on a representative cross section of about 130 common stocks.

It would also compare with a yield of approximately 3¼ per cent on the Dow-Jones industrial average. Accordingly, I think that the opportunity to buy stock of General Motors quality on a five per cent yield basis on a seemingly secure dividend, in contrast to the yields obtainable over all, would make it attractive.

Now, a price of thirty-five, which is the lower end of the range, would give greater recognition to the unhappy prospect of having these sales and distributions take place in the ten years. At thirty-five your yield would be 5.7 per cent. Somewhere in that range, thirty-five to forty, yielding five to 5.7 per cent, I think General Motors would be attractive, and I think that investors would sell other securities to buy it.

[fol. 2229] Q. I take it that the fund is interested in relative market performance of one stock as against another?

A. It is a vitally important thing with us, this question of relative market performance. As I stated earlier, we are virtually 100 per cent invested at all times, and everytime we sell a stock we have to invest the proceeds with another one; consequently, it is a matter of trying to judge the relative performance of each one.

I do not think that we would openly or knowingly or willingly go out and buy a stock which we felt because of

some particular factor was doomed to have a below average market performance for an indefinite period of time.

In the final analysis, one of our main investment goals is to have the asset value of the fund, of the Trust or the Fund, both of them, perform better than the market as a whole, and certainly, I hope, better than our competition.

Q. Now, let me address, if I can, your attention to some specific features of the Government proposal. You mentioned the fact that under the proposal a trustee would be selected to sell presumptively once each year or each year about two million shares of General Motors common stock and that he would have the permission to postpone this if he found it was necessary to do so. I think you understand that feature of the plan?

A. Certainly.

Q. Could you state for us, Mr. Moses, the extent to which your opinion as to the price level at which you have testified you would be willing to recommend the purchase of General Motors shares was influenced by this aspect of the plan, these trustee sales?

A. I think that the sales by the trustee would cause a part of the impact on the price that I would expect would occur, but that the effect would not be as great as the sales by du Pont stockholders of the General Motors shares which would be distributed to them.

[fol. 2230] I am assuming that the trustee will use his best care and judgment to select good financial advice and pick his timing in making his sales each year.

On the other hand, each of these sales is a major financial undertaking. Just taking the price of $40, for example, the sale of two million shares of General Motors is a distribution of some 80 million dollars worth of stock, and I do not recall that there have been too many distributions of that size or greater in the past, well, twenty years.

In fact, I think the important thing here is that there is no precedent in financial history for annual distributions of this magnitude, every year for ten years, at the same time that the investing public is aware that that ten-year schedule exists.

I don't doubt that the trustee can make his sales all right, but I should think that the price would have to be attractive at a bargain level; and I know of no indication at the

present time where this increased amount of stock would be taken by somebody at the present price.

Q. Are you aware, Mr. Moses, of any latent demand for General Motors stock which would be available at present prices to purchase the shares?

A. No, I am not. As I testified earlier, we have had no trouble in buying all the General Motors that we wanted within a reasonable period of time at approximately the then-prevailing market price, and I don't know of anyone else that has had any different experience.

Q. Now let me direct your attention to the other aspect of the Government plan.

I think you have already said that you regarded the distribution of the shares to the other du Pont stockholders [fol. 2231] as a more significant feature of the plan. Would you tell me, sir, have you seen this chart which is du Pont Exhibit 25, which shows the tax brackets of the various du Pont stockholders?

A. Yes, sir, I have seen this.

Q. And you are familiar, I take it, Mr. Moses, with the fact that the Commissioner or the Director of Internal Revenue has ruled that this distribution would be taxed as an ordinary income distribution?

A. Yes, sir.

Q. Now having in mind these bits of information, and whatever else you have learned about this, can you tell us the extent to which your opinion as to the price at which you would be willing to buy General Motors is influenced by this distribution?

A. As I said just a few minutes ago, I think that this part of the plan and the distribution of General Motors stock to du Pont stockholders would have a greater depressing effect than the sales by the trustees.

I think that the du Pont stockholders would sell their General Motors for a variety of reasons. Some of them would sell because they needed additional money for cash, cash for living expenses, even though they were really just selling part of their own property. Other people would sell their shares to pay the tax that was incurred by the receipt of the shares, and I assume that they would want to do it as fast as they could, because the tax would be based on the value of General Motors stock on the date of distribution. And there are maybe others that would sell simply because they owned it already and would have enough of it.

I have no way of knowing how many people would sell or how many shares would be sold as a result of these implications, but I think it would be substantial.

[fol. 2232] The thing is that it would be uncoordinated selling, with a lot of different people selling through different brokers just helter-skelter, as opposed to an organized selling by the trustee; and I think it would have more of an adverse effect than, as I said before, with the trustee sales.

Q. You bring this question to my mind. Would the Trust itself sell the General Motors shares which it received on its du Pont shares under the Government plan, were it to be put into execution?

A. Would the Trust sell the General Motors shares that it would receive?

Q. Yes.

A. I doubt that we would. As I said before, it would constitute a taxable income to the Trust, and in order to avoid paying the tax ourselves we would have to pay it out as a cash equivalent; but I am sure we would always have enough money on hand or enough new money coming in to pay out the cash equivalent to our own stockholders.

Secondly, we wouldn't have to sell it, because we have too much General Motors. On our 112,000 shares of du Pont, we would get 15,000 shares of General Motors each year, which is pretty small compared with our present position of 700,000 shares.

My final thought is that if I am right at all in my feelings about the impact of this plan, General Motors would be a better buy than a sale, or in other words it would be too depressed to sell.

Q. What about the Growth Stock Fund? Now it has some du Pont but no General Motors? Would it sell the General Motors shares which it received on its du Pont stock?

A. I believe the Growth Stock Fund would probably sell the General Motors it receives. As I said several times, [fol. 2233] I guess, we do not regard General Motors as a growth stock and it would be a question of just trying to time the sale properly. The amount involved is not very large; I think it is 2200 or 2300 shares of General Motors that we'd receive each year under the 17,000 du Pont.

Q. Are there any other factors that we haven't discussed

which would enter into your judgment as to the price at which you might be willing to recommend the purchase of additional shares of General Motors, were the Government plan to be ordered by the court?

A. There is one other factor that is of importance, and that is the additional burden that would be placed on General Motors by virtue of the Government plan, if it tried to obtain new equity capital sometime within the next ten years. It would have to compete for this new money with the sales by the trustee and with such selling as would take place on the part of the du Pont stockholders; and I think it would just make the task of the General Motors Company much more difficult and possibly they would have to do it, if at all, at a price that would be much lower than it ought to be.

Q. Do you regard this as important?

A. I think it is important. Over the past ten years, I believe that General Motors has raised something over $700,000,000 in new money, over half of which was equity money, or you might call it common stock money. I think all the indications are that there would be a greater need for new money in the coming ten years. The comparative situation in the automobile business is such that the companies are being virtually forced into annual style changes, and the tooling costs of these changes are tremendous.

In addition, there is the problem I think we are all familiar with of what does the public really want? And it [fol. 2234] is exemplified now by the coming out of a new small compact car by the Big Three sometime later this year. There, again, the tooling costs are of tremendous magnitude.

In addition, you have these heavy expenses for machinery and other equipment to offset the rise in labor and other costs; with declining profit margins and inadequate depreciation because of inflation, I don't think those requirements can be financed internally.

Accordingly, it is just my feeling that General Motors would probably have greater need for equity financing in the ten years ahead of us than it has in the past ten years.

Q. Would your judgment towards other automobile stocks, towards the purchase of other automobile stocks be influenced, in addition to your attitude toward the purchase of General Motors itself?

A. Well, I think it would affect our entire attitude, our attitude toward the whole automobile industry.

We have always regarded—I think most of the other investing institutions do—always regarded General Motors as a standard by which we measure or evaluate other automobile stocks. If anything happens to cause General Motors' market position to deteriorate for some reason, I would think it would have an affect on the stocks of other companies; and they certainly would have the same need for equity financing for the reasons I have just expressed as General Motors would, so that they in turn would be competing with General Motors and competing with the sales of the General Motors stock, and I just think it would be a difficult time; and the ones that would be really hurt would be the marginal concerns.

Q. Let us change the assumption. Let me ask you now to assume, Mr. Moses, that the Government plan would be [fol. 2235] ordered by the Court and put into execution, but that du Pont, instead of paying out the General Motors shares in addition to its regular cash dividend, would elect to distribute the shares in lieu of its regular cash dividend.

How would that change the answers you have given as to your attitude toward the purchase, let us say, first, of General Motors stock?

A. This would be payment of General Motors dividends in lieu of any cash dividend?

Q. In General Motors stock rather than in cash, plus General Motors stock?

A. I think if du Pont should elect to do that, it would have a greater depressive effect on General Motors than if it paid them in addition to cash dividends. We would have the same reasons for selling General Motors that I mentioned before, for additional cash requirements, or to pay the tax; but those reasons would be accentuated by the fact that the du Pont stockholder in this instance would get no cash at all.

Consequently, I would expect that he would sell a greater amount, or even a greater amount of people would sell a greater amount of General Motors to take care of these things. And that—at the same time—well, I think that about sums it up.

Q. Would it change your purchasing attitude toward General Motors stock, purchasing for the Fund? Would

it change your opinion as to the price at which you would be willing to recommend a purchase?

A. I think that any policy on the part of du Pont such as that would be rather drastic, and I don't know as I could really set the level at which I would be willing to buy more General Motors stock.

I think we would certainly proceed on a much more cautious basis than we would on the other assumption.

[fol. 2236] Q. Let us turn now to du Pont, the effect of the plan and your attitude toward du Pont stock.

If the Government plan were to be adopted, would you recommend for the Fund and for the Trust and for the Growth Stock Fund purchases of additional shares of du Pont?

A. Well, my answer there would be similar to the one I gave in the case of General Motors. It would depend on the price, and I believe that when the price fully reflected in our opinion the depressive aspects of the Government plan—and wouldn't go down any further—we would consider purchasing more du Pont for the Trust.

Q. What feature of the plan would have this depressive effect on the du Pont stock that you mentioned?

A. The distribution of the 4 million shares of General Motors each year to du Pont stockholders.

Q. Will you tell us why you think it would have that effect, Mr. Moses?

A. Well, I look at it this way. Each du Pont stockholder, or some du Pont stockholders, anyway, might think that he was getting something extra, some sort of windfall in the form of this dividend, this General Motors dividend, when actually all he is getting is a piece of his own money back; and the two pieces of paper he then has are worth no more than they were before. The value of the du Pont will go down on the distribution date by the amount of the value of the General Motors dividend, so that he is no better off, and actually he is worse off because he has to pay an income tax on the receipt of that General Motors stock in whatever his appropriate tax bracket is.

So I think that any alert du Pont stockholder will do what he can to either minimize or avoid his tax liability. If his tax basis or cost of his stock is anywhere near the [fol. 2237] present market price, that is in the high tax bracket, he would be better off to sell it.

If he has a low cost for stock, and is in the low tax bracket—I think I said I believe he would be better off to sell it in the first instance; and, in the second, it would be better if he has a low tax cost, and he is in a low tax bracket, he would be better off to hang on to it.

It seems to me in either event it is a difficult choice, and involves more taxes, no matter what you do.

I just think that because of this tax impact there would be quite a bit of selling by du Pont stockholders; and, conversely, I should think that the buying of du Pont would tend to dry up or shrink, because I don't see, particularly from the individual standpoint, why he would want to buy into a tax liability.

We have had a number of inquiries from our own stockholders and dealers on just that particular point alone. So between the combination of increased selling of du Pont for the reason I have mentioned and the shrinkage in the buying, it just seems to me that the price would work to a lower level and at some lower level I hope we would be buying again.

Q. Would these factors that you have just talked about lead you to sell your present du Pont holdings in the Trust or in the Growth Stock Fund?

A. No, I don't think we would in either fund.

As I stated earlier, we have a tax problem in both funds, but the tax consequences spread out over our shares, in other words, on a per share basis related to our total dividend income, would be so small, and that is because the small size of our du Pont holding or trust, as a whole, that [fol. 2238] I don't think it would inconvenience the stockholder, particularly.

I would rather hold on to the du Pont. If we sell the du Pont, it would be for reasons other than this particular factor.

Q. Can you give me, Mr. Moses, any indication as to your present opinion as to about what price you think you would be willing to recommend the purchase of additional stock, du Pont stock, were the plan to go into effect?

Mr. Owens: Assuming all other factors being equal again, Mr. Horsky?

Mr. Horsky: Yes, assuming present conditions remaining the same.

By the Witness:

A. I think that is about all I can say, that assuming the same conditions exist as we have them now, stock market conditions, business conditions, I would be willing to again recommend the purchase of du Pont at a price of around 160.

At 160, the stock would be selling approximately, or exactly, for that matter, at 20 times estimated annual earnings of $8 a share. This is about the average annual rate of earnings for the past five years; and 20 times price earnings ratio is approximately average for the last ten years.

I think the opportunity to buy du Pont on the 20 times price earnings basis, which is below what it usually sells, would make it attractive. For example, we have six other chemical stocks in Massachusetts Investors Trust which, at the present time, are selling at an average price earnings ratio of about 27 times, and the lowest one of them is around 22 times.

[fol. 2239] In contrast to this, to buy du Pont on a 20 times basis would make it seem attractive, and I think we would probably under those conditions sell other chemical stocks to buy it.

Q. Sell other chemical stocks to buy du Pont stock?

A. If as wide a disparity as that existed, I think it would be the thing to do.

Q. Suppose we make the same changes in the assumptions, Mr. Moses, as I made earlier with you in connection with the General Motors stock, and assume that the Government plan as it is written, but assume that du Pont pays out the General Motors stock in lieu of its cash dividends. On that assumption, what would be the effect, in your judgment, on your purchasing policy on du Pont stock? Would it change the answer you have just given?

A. It would change it to the extent that I really don't know at what price we would buy it. It introduces too many complications.

Certainly, the tax consequence to the du Pont stock holder is no greater than if he received, say, the usual cash dividend. But he is receiving General Motors only, and no cash at all, so he presumably would want to sell some part of his General Motors for cash requirements or to pay taxes, and at the same time General Motors would be in a

depressed state, not a very saleable commodity, for the reasons we have just discussed.

In turn, it would appear that du Pont with General Motors' component depressed, would, in turn, suffer in the market, and you still have the further aspect of what du Pont would do with the money that it has accumulated meanwhile in lieu of paying it out, as to whether it could reinvest it in any way on as attractive a basis as it now stands with its General Motors investment.

[fol. 2240] I feel that I just want to sit back and watch these things develop and try to sense while they are in motion as to what the effect might be. I would hate to say where I would buy du Pont under those conditions.

Q. And you might not buy it until you could see how it did work out, is that right?

A. It might be too late then, but I would rather take that chance rather than just arbitrarily assume that there is some level at which I would buy it.

Q. All right. Now, let me change the assumption again. Assume that the Court were to order the Government plan, as you have outlined it, but would change it in one respect and make it a twenty-year plan rather than the ten-year plan, other things being the same. That would be the only change.

On that assumption, Mr. Moses, how would such a plan affect your attitude toward the purchase of additional shares of General Motors?

A. Well, I still think the stock would be unattractive, but my attitude toward it would be modified somewhat in that the annual amounts of new stock, additional stock that would have to be absorbed each year would be less.

On the other hand, even though you spread it over a twenty-year period, it still involves sales and distributions of a fairly sizable order of magnitude, and I still think it would give the investors cause to be concerned about the performance, the market performance of General Motors over that period.

I question whether it would be above average performance as long as you had this program even on a twenty-year basis.

[fol. 2241] In addition to that, changing the period from ten years to twenty years increases the prospects of recessions or low points in the automobile cycle. You certainly

would have one or more in a ten-year period, and you will have more than that in a twenty-year period. Any time that happens it just compounds the problem of disposing of General Motors.

Also, over a twenty-year period, I would think that General Motors would have a greater need, not necessarily double the need but a greater need for equity financing.

In short, the presence of that type of risk pretty well offsets, in my mind, the fact that you are making the annual burden less by spreading it over a twenty-year period.

Q. Would the answer given apply equally whether the General Motors stock was issued on top of the regular dividend or in lieu of the regular dividend?

A. Yes.

Q. Making the same assumption as to the twenty-year plan, Mr. Moses, what would your opinion be as to the purchase of du Pont stock under this new assumption?

A. In the case of du Pont, I don't think it would make much change in my opinion or attitude. The tax bite would be less each year, but the total tax burden over the period would be just the same.

I think, just as before when we were talking about the ten-year plan, each du Pont stockholder would have to make up his mind what he wants to do, sell his du Pont stock and pay a capital gains tax, or hang on to it and pay the income tax. I don't think it changes the situation particularly.

Q. Very well. Now, let me ask you one last series of questions.

[fol. 2242]. Have you read the du Pont plan, Mr. Moses?

A. Yes, I have.

Q. Were the Court to order the du Pont plan and were it to be put in execution, in your judgment would there be any adverse effect on your attitude toward either General Motors or du Pont from that plan?

A. If the du Pont plan were put into effect, there would not be any adverse effect at all on my attitude toward either of these stocks. There would be no tax problem involved, and there would be no trustee's sales.

Now, whether or not there would be any favorable market action because of giving du Pont stockholders the right to vote their allocable share of General Motors, I don't know whether that would be a virtue or not that would

have any definite market effect. I just don't think that anything would result unless perhaps on the announcement of the acceptance of such a plan that the stocks went up in reflection of the plan.

Mr. Horsky: I have no further questions.

Cross-examination.

By Mr. Owens:

Q. Mr. Moses, when were you first approached by the defendants in connection with this litigation?

A. Well, I am not sure whether it was last spring, summer or last fall. It has been going on for a long time, and I have seen practically everybody involved in this at one time or another.

I would say that when there actually seemed to be an indication that I might be a witness——

Q. In point of time, sir.

A. It would be several months ago.

[fol. 2243] Q. Can you place it with any precision?

A. Well, I am guessing. It would probably be around September.

Q. Around September of last year?

A. Yes.

Q. And who did you talk with at that time?

A. Well, I talked with Mr. Horsky.

Q. Who else?

A. A Mr. Shapiro.

Q. Did you talk with Mr. Nitschke?

A. Yes, sir and—well, we had visits from—I will go over them all. We had visits from Mr. Hogan, Mr. Nitschke and Mr. Tierney. We had visits from Mr. Shapiro and Mr. Cox and Mr. Horsky.

We *have* a very pleasant visit with Mr. Reycraft and Mr. Metzger. We also had business with Mr. Cowen and his group and Mr. Dallstream and his group.

Between them all, I know that it started somewhere back last April or May, and between summer vacations and a few other things, I guess I would have to get the file out to see when each person came.

Q. When you were first approached on this issue, was the Government plan explained to you?

A. The Government plan was explained the moment it was available. I know, for example, that I read the publicity on it, and we received the release that du Pont sent to its stockholders, explaining what the Government plan involved and what it meant in their view to the du Pont stockholders.

I received a copy, I believe, from Mr. Horsky of the Government plan when it was in printed form for distribution, the white copy or pamphlet.

Q. When did you first express an opinion as to the effects of the Government plan, sir?

A. My opinion as to the effects of the Government plan?

Q. That is correct.

A. I haven't expressed any precise opinion as to the effects of the Government plan beyond to say that I think [fol. 2244] through the various factors that I mentioned here today that they would have an effect on the price of the stocks.

Q. When did you express that opinion, sir?

A. Oh, I expressed it to the extent that I did express it right here this morning.

Q. Are you expressing the same opinion now that you expressed at the time of the first visits from these gentlemen?

A. Well, as I said before, I had so many visits and talked to so many people, and I was not the only one involved in all these meetings. I think perhaps there were a great many remarks or general conversation about the impact of the Government plan on the prices of these stocks, of the tax consequences, and additional sales.

Q. From the outset of your consideration of this proposed judgment, did you at all times entertain the same opinion you entertain now?

A. I have always had the opinion that there would be a depressant effect on the prices of these two stocks by virtue of the Government plan.

Now, as to the testimony I just gave, as to the prices at which we would be willing once again to buy General Motors and du Pont, those precise judgments, if you want to call them that, were formed in the last two or three months.

Q. Did they indicate to you what the nature of the testimony they thought would be helpful to their aspects of the litigation.

Mr. Horsky: Will you identify whether you mean Mr. Reycraft or Mr. Metzger or Mr. Tierney by they?

[fol. 2245] By Mr. Owens:

Q. Do you recall any of those gentlemen indicating to you the nature of the testimony with respect to market effects that they thought would be helpful in connection with this litigation?

A. Talked to me about what they thought—in other words ——

Q. No, did they indicate——

A. In other words, did they put words in my mouth?

Q. No, I am not asking you that, sir. I am asking if they indicated to you the nature of testimony with respect to market effects that they thought would be helpful to them in this litigation?

A. Well, certainly we went over the testimony, as I assume we would do in any case. In other words, I have been asked questions that they think are important to the defense, and I certainly didn't dream up the questions and answers myself without the help of counsel.

Does that answer your question?

Q. Yes, it does.

Now may I ask whether you were requested to make any studies in connection with your testimony?

A. I was not requested to make any studies whatsoever.

Q. And did you have any studies made?

A. No, I did not.

Q. I beg pardon?

A. I did not.

Q. But, as I understand you,—Are you head of the Investment Analysis Department?

A. Yes, sir, I am.

Q. And you are head of that department which is used by both the Growth Fund and Massachusetts Investors' Trust, is that right?

A. Yes.

Q. Did you ask the chemical industry specialist to make [fol. 2246] a study for you in this connection?

A. No, sir, I did not.

Q. Did you ask the automotive industry specialist to make a study of this matter in that connection?

A. I will tell you what I asked him to do. I sat down and

did what you just seemingly said. I tried to reason in my own mind——

Q. No, I want to ask——

Mr. Horsky: He is answering your question.

By the Witness:

A. I will answer your question, I think, satisfactorily.

Mr. Horsky: You asked him whether he asked him to make a study. He is trying to answer you.

The Court: I will let him answer.

By the Witness:

A. Well, I will change it for you. I asked him to do the same thing that I was doing. Simply, in view of the plan and everything that has to do with it, at what level would he be willing to again recommend the purchase of General Motors for the Fund, or for the Trust.

He did it and I did it separately, and we came up with the same answer.

By Mr. Owens:

Q. And did your study, with respect to the price at which you would be willing to buy General Motors—did the price at which you would buy or be willing to buy—was it in any way affected by the Government's judgment?

Mr. Horsky: May I have that question read, please?

(Question read.)

[fol. 2247] Mr. Horsky: I object on the ground of form, your Honor?

The Court: Sustained.

By Mr. Owens:

Q. In arriving at your conclusion with respect to the price at which General Motors would be an attractive buy to you, and at which you would recommend its purchase, in arriving at that figure did you give consideration to the effect of the Government's proposed judgment?

A. In this respect only, that in my opinion, and I have stated the reasons why I felt that the Government's pro-

posed judgment would have an adverse effect on the price of General Motors and on the price of du Pont; however, I am not a market expert in the sense that I can sit down and figure out in precise fashion and give you a dollar figure or percentage figure to measure that decline.

I just felt what I would do in actual practice is to sit back and see what effect and how far it would go, and try to determine at what level of the market would I be properly compensated for these adverse factors.

In other words, at what level would the yield of General Motors, for example, compensate us for the situation that we would have here if this plan went through.

Now, the five per cent figure I mentioned, or the range of five to 5.7 per cent, it might be a little higher, or it might be a little bit lower, but as compared with an average yield of three per cent, on a trust, I felt that I was then being paid for the disadvantages of this 10-year plan, and the same type of reasoning in preparing a 20 times price earnings ratio for du Pont with an average of 27 or——

[fol. 2248] Q. Well, no. I am trying to ascertain, sir, whether or not you considered that you have to have a higher yield, for instance, on General Motors in order to purchase it because of this litigation than you would otherwise generally require in making a recommendation to purchase.

Mr. Horsky: I object. I asked him nothing about the effect of this litigation. I asked him about the effect of the Government judgment if it were ordered by the Court.

By Mr. Owens:

Q. I take it that is the effect of the Government's proposed judgment, Mr. Moses?

A. Well, I am lost.

The Court: Restate it.

By Mr. Owens:

Q. Would you tell us whether or not in considering the yield at which General Motors would be an attractive purchase to you—did you consider in that connection the Government's proposed judgment if it were entered as

requiring a higher yield than you would otherwise require before recommending the purchase?

Mr. Horsky: I object. He has just answered the exact question, your Honor.

The Court: I thought he had answered it.

Mr. Owens: I don't believe he has answered it.

The Witness: Well, may I answer it?

By Mr. Owens:

Q. Yes.

A. Well, if I answered it before I would like to hear that answer.

[fol. 2249] Q. Are you getting lost?

A. Mr. Horsky says I answered it before.

Q. Well, do you remember your answer?

A. Maybe we had better start all over.

The Court: Well, regardless, will you answer the question, please?

By Mr. Owens:

Q. Would you tell us whether or not the yield at which you would recommend General Motors—you mentioned something like five, five and a half per cent, I believe.

A. Yes.

Q. To what extent do you require a higher yield because of an assumption of the Government's proposed judgment being ordered?

A. Well, certainly the higher yield is based on the assumption that the Government's plan would be ordered. If there was no Government plan we certainly—well, I assume we might buy General Motors just like we did last September when the yield was four and a half per cent.

Q. Would you tell me how you believe the Government's proposed judgment would require—why you think the Government's proposed judgment would require you to have a higher yield comparatively?

A. Because my feeling or analysis of the Government's plan is that because of the various consequences involved——

Q. What consequences?

A. The tax consequences, primarily in the selling by du Pont stockholders on an unorganized basis of the General

Motors stock would in my opinion have an effect on the price of the stock. Now, as I said before, I have not tried to [fol. 2250] measure that, as some people have here in precise percentage terms, dollars and cents terms; but since I feel that there is an effect that would not otherwise exist except for the plan, therefore, I think that I should be entitled to buy General Motors on a relatively more attractive yield basis than I would otherwise.

I compared, if this is what you want to call a study, I compared the price of General Motors with the average rate of return on the portfolio of the fund for representative periods over the past ten years, and, as you would expect, the yield on General Motors has always been higher than the average return on the fund, but yet not as high as—except unless you go way back to '48, '49—not as high as this two per cent differential.

Now, I merely picked that, and, as I said, you could go to a 5.7—I only picked that as giving me some compensation for the adverse effects of the Government plan.

Q. Well,——

A. There ought to be some level at which the price of a stock discounts any adverse development, whether it is this one or any other. In my view, with everything as it is today, the same factors we have in front of us, and the price at 46, somewhere in that 35 to 40 level I felt that General Motors on a 5 to 5.7 yield basis would pretty well reflect what I visualize as the adverse implications of this plan.

Q. Now, in making your assumptions in that regard, did you assume that the Government plan would cause any change in General Motors management?

A. No, I did not.

Q. And did you consider that it would result in any changes in General Motors' growth prospects, for instance? [fol. 2251] A. The fact that it might interfere with General Motors' growth prospects——

Q. Yes.

A. (Continuing)—is if it interfered, as I am afraid it would, with General Motors needs and efforts to obtain new equity money, and to the extent that new equity money is necessary to finance additional growth and they cannot do it, it would have an effect on its growth.

Q. Do you know when the last time General Motors required equity financing?

A. 1955, I believe.

Q. Do you know the last time it was before that?

A. Well, they sold a preferred issue, if you want to call it that.

Q. That is not equity financing, is it?

A. Sometimes people argue about that. I agree with you, it isn't. No, I do not know. I do not recall that they did, but I am not sure.

Q. Have you considered the possibilities of obtaining other than equity financing as a probably comparative cost to other financing?

A. Well, surely under today's interest and tax structures where interest rates are deducted for tax purposes, it is better to finance through debt, it is better for the stockholder than selling new equity; but there is a limit to the amount that any company can do that.

Q. And would that be factors depending upon what the funded debt is of G.M. as related to their capitalization?

A. It would depend on the ratio of the debt of General Motors to its total capitalization. I do not say it couldn't. If it borrowed all its requirements over the next ten years, perhaps it wouldn't have to do with equity financing, but I do not want to have to assume that.

Q. Well, do you know what the percentage of their funded debt is to their total capitalization now, sir?

A. No, I don't. It is a modest figure, I am sure.

[fol. 2252] Q. Would you say it is an extremely modest figure?

A. I think probably it is.

Q. Pardon?

A. I think probably it is extremely modest, but since I do not know——

Q. And do you know how that affects the costs of funded debt financing?

A. Well, General Motors can borrow on probably as favorable terms as anybody in the country.

Q. So, do you visualize, in taking into account this probability of comparing the capacity for equity financing, that it is really a material factor in your judgment?

A. Well, I think it is important because, despite the ability of General Motors—with one of the highest credit

ratings in the country—despite that ability to borrow, they still raised equity money during the past ten years and I think the next ten years promises to be much more difficult for the automobile industry than the past ones.

Q. Well, I understand you say that they will need some—Your estimate is that the probabilities are they may need some more outside financing, is that correct?

A. Yes.

Q. And in arriving at that judgment, have you considered their percentage of pay-outs over what their retained earnings are?

A. Well, they have paid out, oh, I don't know the precise figure, but I think they paid out perhaps from two-thirds to 70 per cent. Certainly in recent years. Despite that fact they still had to raise a substantial amount of outside money consisting of both debt preferred and common stock in the past ten years together with their retained earnings and depreciation.

Q. Do you know what their relative depreciation accruals are in terms of funds that would be available for financing, [fol. 2253] plant modernization or expansion?

A. No, sir, I don't.

Q. Do you have any idea?

A. No, sir.

Q. Did you make any study in that connection?

A. No, sir.

Q. Do you recognize it as a highly relevant factor in determining prospective need for financing of any kind?

A. Well, certainly it is. If I were——

Q. Pardon?

A. Certainly it is a relevant factor.

Q. You made no study of that?

A. No, I have not sat down and tried to figure out what General Motors' financial needs would be over the next ten years.

Q. How much weight in your judgment as to the attractiveness of General Motors stock did you attribute to what you characterize as the poorer prospects for obtaining equity financing?

A. How much weight did I give to that factor as compared——

Q. Yes. I said——

Mr. Horsky: Wait a minute. Let him finish his answer.

By the Witness:

A. (Continuing) I am just trying to repeat your question so I will understand. You want to know how much weight did I give to that factor, the difficulty in raising equity money as compared to other factors I may have taken into consideration?

By Mr. Owens:

Q. That is correct.

A. Well, I could not give it a weighting or percentage. It is a factor that was taken into consideration along with all the others.

[fol. 2254] Q. Well——

A. I could not say to you it was half as important or one-third or ten per cent.

Q. But normally when you analyze a problem, as a matter of analysis, don't you try to assign weights to the various factors in some way? Does this represent half of the basis for your judgment, three-quarters of the basis for your judgment?

A. I do not think anybody is that precise in our business that they sit down and assign weights to all of these different factors. There are a great many factors that one always has to consider in buying and selling a security.

Q. Well, you don't——

A. It is the net sum of them all that finally determines what you do. Sometimes one is more important than the other.

Q. Well, you don't recognize——

Mr. Horsky: Mr. Owens, will you please try to contain yourself.

The Court: (Addressing the witness) Did you finish your answer?

By Mr. Owens:

Q. Have you finished, sir?

A. Yes, sir, I believe so.

Q. Do I understand you to say that there is no way you

can attach any comparative weights to the factors that influence your judgment?

A. Well, if I gave a discourse on security analysis, I don't suppose I could still do it. Among the most important factors that anybody considers are the earnings and dividend prospects for a company, but while those are important, you have to take into consideration a great many other things too. By themselves—I am afraid that some people are apt to give them too much weight sometimes.

[fol. 2255] Q. Is there any way that you can tell me the extent to which the difficulty that you perceive in General Motors obtaining adequate equity financing entered into your judgment as to why you would require a higher yield of GM in order to make it an attractive purchase, as compared with other stocks that you might be interested in purchasing?

A. I do not believe that I related the difficulty in any particular fashion anyway, the difficulty of General Motors obtaining more equity money to the question of whether I would buy General Motors on a five per cent yield basis.

I consider the difficulty by virtue of the Government plan of General Motors raising more equity money as being another serious factor to think about and another problem. I do not think it would be possible for anybody——

What you want me to say, I think, is that the additional two per cent that I want for my General Motors, or some part of it, must be there, because General Motors is going to have a tough time raising equity money. You just cannot do that kind of thing.

Q. Well, now, if I understand your testimony, you said that you would require, before you make investment recommendations, a higher yield on General Motors because of the Government's proposed judgment than would otherwise be the case; now, is that correct or not? Is that what you testified to?

That is one of your ultimate conclusions, sir.

A. Now, wait a minute. I want to make sure of the proper phrasing. I said that I would be willing to again recommend the purchase of General Motors on a five to a 5.7 yield basis, as compared with the present overall yield of three per cent; because I felt that somewhere in that [fol. 2256] range I was being compensated for what I visualized as the adverse aspects of the Government plan.

Q. So, as I measure that, it is 2, 2¼ per cent?

A. Well, it is a difference of 2 per cent.

Q. Right. I am asking you as to what factors enter into your judgment as to why you should have the 2 per cent higher yield with respect to General Motors than would otherwise be the case, and you stated that you cannot ascribe any portion of that to the difficulty of raising equity capital; is that correct?

A. General Motors——

Q. Is that correct? May I ask you to answer that question?

A. Will you repeat that question, please?

Q. Do you ascribe to what you say will be the difficulty of General Motors obtaining equity financing—do you ascribe to that any portion of this 2 per cent higher yield that you say you are going to need before you buy General Motors?

A. I do not ascribe that difficulty to any portion of it in measurable terms. It is just another factor that has an adverse aspect on General Motors' situation. That is one of several of the factors involved in the Government plan.

Q. Is it one of the significant factors to you?

A. I think it is an important consideration.

Q. You think it is an important consideration?

A. Yes, it is an important consideration, but even if you removed it you still have other considerations of an adverse nature.

Q. Well, we are trying to measure the weight that you attach to these various factors and a basis for your judgment in order to determine whether or not your judgment is reasoned judgment or just a conclusion.

[fol. 2257] Now, am I correct in understanding that you can in no way ascribe any weight to the difficulty you perceive in General Motors obtaining equity financing in accounting for what you say you need, a 5, a 5¼ per cent yield for General Motors, as compared with a 3 per cent yield for other securities?

A. I made no attempt to assign any weight, and I do not think you can assign any weight of the kind you are talking about to these individual factors.

Q. Can you say it is a fairly important factor, a very important factor, or——

A. I think——

Mr. Horsky: I object. I think we have gone over this several times.

The Court: Sustained. It is repetitious.

By Mr. Owens:

Q. Now, in asking you as to the basis for the factors going into your discrimination between 3 and 5, or 3 and 5¼ per cent, I asked you whether or not you assumed that there would be any difference in the growth potential of G.M. as a consequence of the Government's proposed judgment. At that point we got diverted on this equity financing.

I ask you now, again, whether or not there are any other factors in the Government's judgment that you think would change the growth potential of General Motors?

Mr. Horsky: Other than what?

Mr. Owens: Other than the difficulty raising equity financing.

Mr. Horsky: Thank you.

By the Witness:

A. Any other factors that would disturb General Motors' growth potential? No, I don't.

[fol. 2258] By Mr. Owens:

Q. You don't?

A. I do not know of any.

Q. So let me ask you, then, in what way you feel that the Government's judgment should result in your forming the conclusion that you require 2 or 2¼ higher per cent yield before you would recommend the buying of G.M.?

Mr. Horsky: Is that a question? May I have it read? I don't understand it.

(Question read.)

Mr. Horsky: I object, on the ground of form, your Honor. I don't think it is understandable.

The Court: Sustained.

By Mr. Owens:

Q. Could you tell me what other factors there are in the Government's judgment that would cause you to recom-

mend a higher yield than you would otherwise use as a bench mark for recommending the purchase of G.M.?

Mr. Horsky: May I ask again that you identify "other" for me? Other than what are we talking about now?

Mr. Owens: The same "other"—other than his difficulty that he perceives in obtaining equity financing.

By the Witness:

A. I already testified to the effect.

By Mr. Owens:

Q. No. You have testified that you think that the Government's plan will have a depressing effect on the price. Now if it has a depressing effect on the price, it will come [fol. 2259] down to some point at which it will be attractive to you.

Now I am asking you why you think it has to come down so that the yield is five or five and a quarter per cent rather than a yield which you would use as a bench mark for recommending any sound equity stock.

A. Well, I thought I mentioned earlier that I had compared the yield on General Motors with the average yield or rate of return on the trust at representative periods over the past ten years, and that there always has been a margin or differential in favor of General Motors, not quite as high as two per cent.

I increased it to a little higher figure, because I feel that one should have or I might have more than a normal spread between General Motors and the yield on the trust by virtue of the Government plan being in operation. Now maybe the five per cent should be six, or maybe it should be 4.9, but there should be some compensation to the investor over and above the normal relationship—at least, the figures I just gave you—by virtue of the impact of the Government's plan.

Q. Can you give me anything other than your feeling that you should be compensated in that regard?

A. I think it is more than just a feeling. If you or I—I am an investor in General Motors stock, I see absolutely no reason in the world why I should buy it at present prices, or——

Q. That is regardless of the Government plan, isn't it?

Mr. Horsky: I think you interrupted him.

By the Witness:

A. (Continuing) No. With the Government plan in effect, or if I knew for some reason that this Court were going to order that plan into effect, there is no reason in the world why I or anyone else, in my opinion, would buy shares of General Motors; but at some level, every stock [fol. 2260] seeks a level at which it discounts the unfavorable factors in its picture, unless it is going into bankruptcy and it discounts then to zero. But I was trying to seek a level, in my own judgment, where I felt that I would again be willing to recommend a purchase of the stock for the trust.

Q. Can you ascribe any per cent of this spread of two and a quarter that you attribute to the prospect of the Government's proposed judgment?

Mr. Horsky: May I have that question read, please?

(Question read.)

Mr. Horsky: I object on the ground of form.

The Court: Sustained as to form. The Court will recess now.

(Whereupon an adjournment was taken in the trial of the above-entitled cause until two o'clock p.m. of the same day.)

[fol. 2261] Befofe Hon. Walter J. LaBuy, Wednesday, March 25, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.
Present: Same as before.
The Clerk: Case on trial.
The Court: Proceed, please.

William B. Moses, Jr., a witness called on behalf of the Defendant, E. I. du Pont de Nemours and Company, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination.—(Continued)

By Mr. Owens:

Q. Mr. Moses, when we adjourned for lunch, we were discussing whether you could indicate the basis upon which

you determined that you would need a larger yield in the event that the Government's proposed judgment were ordered into effect, in order to recommend the purchase of GM, than you would otherwise recommend.

Can you tell me what percentage of yield you would require at the present market considering if the Government judgment was not in effect or proposed to be in effect?

Mr. Horsky: I object, your Honor. I don't understand the question.

[fol. 2262] The Court: I am not clear. I will sustain the objection as to the form.

By Mr. Owens:

Q. I think you testified that the yields on your stock generally were on an average in the neighborhood of three per cent?

A. That is right.

Q. I am asking you what yield, disregarding the proposed judgment of the Government, you would require in order to recommend the purchase of General Motors stock.

A. Yield wouldn't be the only consideration in this case. We bought it in September, when it was approximately the same price as it is now, $46. The yield then was 4½ per cent.

Q. The yield was then 4½ per cent?

A. Well, I don't have my mathematics in mind.

4.35 per cent at the time of the purchase last September, and the price is about the same now. But, I can't say that just because we bought it then at that yield price last September, that I would recommend we buy it today, even if there were no Government plan, because we would consider not just the yield alone but General Motors' earnings prospects for this year, and its potentiality, if we could, and its value compared to whatever else we might do with our money.

Q. So other things being equal, you require a yield of something in the neighborhood of 3.4 per cent if the conditions are the same as when you bought it previously?

A. Well, I don't require any particular yield. The yield would be part. It would be taken in consideration with all the other factors one uses to determine whether they should buy a stock or not, and assuming that we like General [fol. 2263] Motors prospects for this year, we are talking

right now no plan, presumably the present yield of something better than four per cent, 4.3 per cent would be perfectly satisfactory.

Q. It would be perfectly satisfactory?

A. Yes.

Q. Do you see a way in which the Government plan is likely to adversely affect General Motors earnings?

A. Affect General Motors earnings?

Q. Yes, sir.

A. No, I do not except the point I touched upon earlier, if this in any way interfered with General Motors' ability to grow and to do equity financing, and prevented it in that way from making higher earnings than it might have had without raising new money, then I would say that the plan would have some effect on the earning power, but aside from that point I don't see that it would.

Q. Other than a matter of the effect on equity financing which you testified to this morning, do you think of any other factors resulting from the execution of the Government's proposed judgment that would adversely affect General Motors earnings or yield or similar considerations that you take into account, growth potential, and so on?

A. I don't see any factors that would affect General Motors earnings. I do see factors that would affect the yield, because, as I testified this morning, because of the trustees' sales and because of the selling by du Pont stockholders of General Motors stock for tax reasons and others, I would expect that there would be an impact on the price of General Motors, and to the extent that there is impact, if I am right, it automatically is going to carry a higher yield. That is, still assuming no change in dividend.

[fol. 2264] Q. You don't see any change in the dividend as a result of the Government's plan, do you?

A. Not as a result of the Government's plan, no.

Q. Nor any change in their earnings as a result of the Government's plan?

A. Not immediate earnings. As I said before, you could possibly draw a connection between the inability to do equity financing and the future level of earnings. Aside from that I don't see any connection between the plan and whatever earning power General Motors will have.

Q. Then I take it as a result of your testimony this morning, you are unable to give any relative weight to the

factor of what you consider inability to do equity financing?

A. I didn't give it any relative weight, and I don't think I could. I testified as to various factors that I thought would be depressive in their effects on the price, and this is one that would have effect on it.

Q. Now, you stated this morning you were head of the investment analysis department?

A. Yes, I am.

Q. And in that department, you have various people who specialize in various industries.

A. Seven men.

Q. And you use, among other things, various statistical services?

A. Yes, we do.

Q. Do you know whether those statistical services that you employ make any study of the correlation between volume and price?

A. I have seen none.

Q. I beg pardon.

A. I have not seen any. That does not mean that they don't, but I am not familiar with any correlation between volume and price.

Q. You testified, I believe, that as part of your background and experience, you are a security analyst, and were a security analyst with Lehman Brothers at one time.

A. That is right.

[fol. 2265] Q. And that generally it is part of your responsibility now to engage in security analysis?

A. Well, to the extent that I have to pass judgment and vote on the work of my own security analysts, I am engaged in that work, yes.

Q. You are in a supervisory capacity with respect to security analysts?

A. That is right.

Q. I take it you are qualified in that field?

A. Yes, I am.

Q. Now, do you consider that the making of predictions as to future market consequences of various things is a part of security analysis?

A. I think it is part of the work of trying to determine what values will be. We try to look in the future and see what will happen to prices to some extent.

The main thing, as far as future work is concerned, we try to project earnings and dividends ahead, and in turn relate that to market price. But we never go too far ahead, because there are too many things that change the picture always. It is the trend that is important.

Q. The trend is important?

A. Beyond the current year, the trend of the direction of earnings to my mind is more important than what the company will earn and pay in 1961, because, who knows what is going to happen between now and then?

Q. Do you see any difference in the trend of earnings in the General Motors as a consequence of the Government's proposed judgment?

A. No, I see no—— Let me hear the question, please.

(Question read.)

[fol. 2266] By the Witness:

A. The answer is I do not see any except for the fact that, as I mentioned before, the possible interference with equity financing some time in the next ten years as having a bearing upon the possible level of General Motors earnings.

By Mr. Owens:

Q. You testified, I believe, that your present holdings of G.M. amount to 2.4 per cent of your assets?

A. I believe that is the figure.

Q. And under your investment policy, you do not invest in excess of 5 per cent of the assets of the fund in any one issue?

A. That is right. Also, not more than 5 per cent of the outstanding voting securities of an issue, and we cannot hold more than 5 per cent at market of the assets.

Q. So that as far as your investment policy goes in respect to that limitation, you could increase your holdings in G.M. from 2.4 up to 5 per cent within your current policy?

A. We could do that.

Q. I think you testified also that you had 1½ per cent of the Investment Trust in du Pont?

A. Yes, I believe I did.

Q. And you could then, I take it, increase that up to 5 per cent under your present policy considerations?

A. We could do that.

Q. Now, I understand that the Massachusetts Investors Fund is an all-common stock fund?

A. That is right.

Q. And that it is your policy to keep that fully invested with the exception of some small amount, relatively small amount of working capital?

A. Yes, sir.

[fol. 2267] Q. Could you tell us in making your investment recommendations whether you place your emphasis upon primarily security analysis or whether you base it primarily in terms of market analysis?

A. We base it primarily on security analysis, and the reason for that is that it ties in with our being fully invested at all times.

As the new money comes in, which it does on a day-to-day basis, we invest it right then. In other words, obviously not that minute, but we invest it right along in those stocks at that particular time, whether the market is the way it is today or at 400 or 350 Dow-Jones, we invest it in those things that seem to be attractive on a relative basis at that time.

Q. So that you take your funds and invest them as rapidly, more or less, as you can, is that true?

A. As rapidly as is commensurate with good suggestions and ideas from the research men and the ability to buy the stocks, and it moves along pretty well.

Q. And you make those investments on a comparative basis of market price of one security as against another security compared with your security analysis of the intrinsic soundness of the security, is that right?

A. That is right. The standard procedure is to compare any particular stock first with all the other stock in its group and beyond that we would also compare it with other stocks that we also like in other groups because we might be better off just buying them than buying the new one.

Q. In making a security analysis of General Motors stock, is there anything in the proposed judgment that would affect your determination there as to the essential soundness of GM as a security?

[fol. 2268] A. Nothing in the proposed judgment that affects the essential soundness of GM as a company or GM's prospects in the automobile industry beyond this one question of equity financing.

Q. You stated, I believe, that the Growth Fund has no General Motors stock?

A. That is right.

Q. And it has some 17,000 shares of du Pont?

A. Yes, it does.

Q. And I believe you stated you did not hold General Motors stock because in the judgment of the Fund it did not represent a comparatively good growth prospect?

A. Well, it does not represent what we consider to be above average growth. We feel that the automobile industry will grow, grow with the economy, but we are trying to find industries and companies that have above average growth.

Q. Above average growth?

A. Above average.

Q. However, you do invest in du Pont despite the fact that you recognize that approximately one-third of its earnings stem from what you consider a cyclical industry, such as the automobile?

A. That is right.

Q. Du Pont then, I take it, were it not burdened with what you consider to be less attractive growth prospects of GM, would be a more attractive growth stock?

A. We would be very happy to have General Motors—rather, I mean, du Pont as a straight chemical stock by itself, and if there was a simple way without any tax impact or market impact, just separating the two pieces of paper, why, I think we would be very happy with it.

Q. That would give you greater flexibility in your investment decisions, would it not?

A. Well, I believe we would sell the General Motors, judging the timing properly, but we would rather have the du Pont alone as a chemical stock.

[fol. 2269] Q. Will you consider, in the event the General Motors were received by you, selling the General Motors of the Growth Fund to the Massachusetts Investment Trust?

A. No, we have never done any transaction between the two funds. We can do it, but, as I understand it, we have

to get permission from the SEC to sell from one fund to the other, and the red tape and effort involved is not worth doing it.

Q. Do you have any personal knowledge of the extent——

A. We have had an occasion where we received something like High Voltage Engineering as a stock dividend on investments in American Research and Development Company. High Voltage is a good low stock with interesting prospects in that field. The logical thing would have been to sell the stock MIT received to the Growth Fund, but it just isn't worth the problems involved.

Q. But was that of any magnitude comparable to the magnitude of the securities that would be involved here in the event that a distribution of GM dividends to the Growth Fund——

A. No. The dollar amounts are very small, but the problem still exists. I am not saying that we would not look into it. It is just that in those instances where a similar situation has occurred, it is just too much trouble. We would be better off for the Massachusetts Investment Trust to sell the stock to some broker and have him turn around and buy an equivalent amount somewhere else.

Q. My recollection is, Mr. Moses, that you testified this morning that you consider GM to be the standard by which you judge automotive stocks in general.

A. Yes, I did.

Q. And you stated, I think, that if General Motors' position or prospects deteriorated, it would cause you also to take a dimmer view of the other automotive stocks?

[fol. 2270] A. Well, that follows from my first statement. We have always compared Ford and Chrysler to General Motors.

Q. Well, suppose we take it as the assumption that General Motors deteriorated only in respect to its share of the market. Would that cause you to take a more optimistic view of other automotive stocks?

A. If General Motors deteriorated——

Q. In respect to its share of the market.

A. Of the stock market?

Q. No, of the automobile industry.

A. Well, there are times and have been times when General Motors' share of the market has decreased and, in fact, that is one of the reasons, I think, that motivated,

at least in some part, our reduction from our peak holdings.

Assuming at any time we would have to take those facts into consideration, I am sure that there are times when we would think Ford was more attractive than General Motors or maybe Chrysler more attractive on a speculative basis. In so determining, we still get back to comparing it with General Motors in the first instance.

Q. Well, if General Motors' share of the market tended to decline and the other manufacturers' tended to increase, that would make them relatively more attractive, would it not?

A. Everything else being equal, it would.

Q. Now, I take it that before your investment advisory committee acts and before your trustees participate in those considerations; you undertake to inform yourself rather fully with respect to current conditions on the basis of analyses prepared by your investment analysis department?

A. Are you talking on a general basis or as far as individual stocks are concerned?

[fol. 2271] Q. Yes, in making investment decisions.

A. We base our investment decisions on the work done by the individual research men, which involves reading all reports and memoranda that they have written on the subject and discussing it with them orally, trying to satisfy ourselves as to any questions that are not answered or any information that seems to be missing.

Q. Do you require that those reports be current?

A. Oh, yes, absolutely current.

I spoke this morning of having personal interviews with every company that we followed, and those are supposed to be written up just as soon as possible; and every one of them is accompanied by a recommendation which may be nothing more than a simple word, "hold," but the research man has to state his opinion as to the stock right at the heading.

Q. On the basis of the current analysis?

A. On the basis of that current analysis.

Q. And do you believe that there are dangerous qualifications in predicting now what the relative decision would be likely to be in the future with respect to retaining or

holding General Motors if the Government's judgment were ordered into effect?

A. If the Government's judgment were ordered into effect, I would be concerned about the impact.

Q. On what?

A. On the market of the selling of the shares by the trustees and of the selling by du Pont stockholders, for the reasons we have covered before.

Q. Now have you made any study of what you anticipate the impact on the market would be, depending upon the manner in which the marketing was done?

A. No, I have made no study of that kind.

[fol. 2272] Q. Do you consider such a study to be relevant, sir?

A. I think such studies are important for people who are qualified. I think that is where a market expert, such as Sumner Emerson, who has appeared here, is qualified to pass judgment on it.

Q. You have made no such studies?

A. No, I have not.

Q. And I take it that your opinion is in no way founded upon the relative degree of market impact that might vary depending upon the means of marketing decided upon?

A. The answer to that is no. No, I have not gone into it on that basis.

Q. Do you appreciate, sir, that the effect on the market may vary considerably, depending upon the manner and timing of the marketing?

A. I can see where the effect on the market would be different if you—we are talking about the trustees selling—if you did it on a twenty-year basis, as compared with a ten-year basis. That would be different, and it would be very important as to the timing each year of when the trustee made his sales; also in the year in which General Motors might have record earnings, with a possibility of an extra dividend. I think its problem would be much simpler.

Q. How much weight would you attach to your estimate of the market impact depending upon various alternative methods of its being marketed?

A. Well, as I said before, I didn't make any precise study or measured study of the effect of these various adversities on the prices of those stocks, in any of these

considerations. I merely have said that I believe there will be an impact on both stocks; and, because I believe so, that is, as an investor, I am retiring to the sidelines, in effect, and watching to see what will happen. But there is, [fol. 2273] based upon present conditions, a certain price level for each of these stocks, at which I would again be interested; and that is the basis of what I have tried to give in my testimony.

Q. You have made no analysis as to the extent to which their price level may or may not be affected depending upon the type of marketing that would be selected or the combination of marketing techniques that would be used if the Government's judgment were ordered into execution?

A. I have made no study of that kind.

Q. That is one area in which you have given no consideration.

Do you have a judgment as to how markedly that would affect your ultimate conclusion?

A. I don't believe I understand your question.

Q. Do you have an opinion as to how significantly the difference in marketing techniques might affect your ultimate conclusion?

A. As between the twenty-year basis and the ten-year basis?

Q. No, just on the ten-year basis.

A. We haven't discussed any difference in marketing techniques on the ten-year basis, have we?

Q. No. I am asking you now—you have given us your judgment of the depressant effect on price and how it would affect your investment decisions. Now I want to know how much of your judgment is likely to be affected by this factor that you haven't considered, namely, the techniques of marketing within the ten-year period, in the event the Government's proposed judgment were ordered executed.

A. I have assumed right along that the trustee will use his best techniques possible, the best advice possible, and will select his timing as carefully as he can.

[fol. 2274] He does have an option that if he can't sell 2 million shares in one year, he can sell 4 million the next or 6 million in the third year; but I still feel regardless of how he does it, that there will be an impact on the price

of General Motors stock by virtue of having that additional supply on the market.

I haven't tried to assess or measure in any way the differences in degree as between one type—I don't know what types of distribution there would be, in the first place; that you indicated there may be. But you have the impact of that, and you have the impact of the selling by du Pont stockholders, which I think, since that is unorganized, and uncoordinated, it could be more serious than the sales by the trustees.

Q. I take it you have assumed that all of the selling by du Pont stockholders would be unorganized?

A. I made that assumption. I have heard some discussion about whether there is any way to possibly have that selling be on an organized basis, and it just seems like too much of a complicated thing to be done.

Q. You assume it would be on an unorganized basis?

A. That is right.

Q. Now on the du Pont exhibits introduced this morning; du Pont Exhibits Numbers 45 and 46, there are the transactions of the Massachusetts Investment Trust on du Pont stock and on General Motors stock. Do you know what the respective yields were at the time that you purchased and sold those securities on those various dates?

A. Well, I have them written down in the margins of the copy I have.

Is that fair?

[fol. 2275] Q. That is fair, as we play it here.

Taking the GM securities first, I think your first entry there is a subscription to General Motors in the amount of 11,750 shares.

A. Yes.

Q. And what was the yield at the time you exercised those subscription rights?

A. 4.27 per cent.

Q. 4.27 per cent?

A. Don't hold me to the accuracy. I did these with a fast slide rule.

Q. All right, that is good enough for me.

I see next, on February 8, 1955, a purchase of 3250 shares of GM.

A. That transaction is merely rounding out our subscription period.

You will note that the date appears to be ahead of the subscription date of March 1, and my best memory is that that actually is the layoff stock.

Anyway, we rounded out—we were entitled to subscribe to 11,750, and we rounded it out to 15,000 shares, so your yield is the same in both of those instances.

Q. And I take it the next is the purchase of 10,000 shares on February 5, 1955.

A. I owe you a correction.

The 4.27 yield applies to the 97¾ price and not, obviously, to the subscription price of 75.

Q. I understand.

How about the February 5th purchase of 10,000 shares?

A. 4.27.

Q. And the March 31, 1955—10,000 share purchase?

A. 4.27.

Q. And the June 21, 1955 purchase of 5,000?

A. 3.66. Then I have 4.26.

I think I did it both ways, with or without an extra dividend.

Q. 3.66 and what?

A. 4.26.

[fol. 2276] Q. Figuring yields, do you usually include the year end or the extra dividends?

A. We talk always in terms of what the current yield is on our stock; and if, in figuring the current yield, we have the expectation of an extra dividend, we take it into consideration.

Q. And these figures are based in that fashion?

A. Well, I actually don't remember, as far as that goes; so I am just assuming that is the difference in my two figures.

Q. Now turning to the sell side on 11-23-55; let me stop there.

Taking it at this point and prior to the succeeding transactions, there was a split of three to one. Do you recollect that as being exact?

A. That is right.

Q. And your figures prior to 11-23-55 are not adjusted for the split?

A. Well, the price is not adjusted. The dividends would be unadjusted, too.

Q. The number of shares is not adjusted?

A. That is right.

Q. Now on the sell side on November 23, 1955, you sold 15,000 shares of GM?

A. Yes.

Q. What yield did you figure at that time?

A. Those are the two figures I gave you. This is June 21, 1955?

Q. No. I am talking about the 11-23-55 sell.

A. 4.32.

Q. Can you explain or can you recall the circumstances that led you to sell despite the fact that the yield was higher than it previously had been all the times you had been buying?

A. Well, it is a little hard to recall all the reasons for a transaction when you are dealing with something over 170 different stocks, but General Motors enjoyed a tremendous boom in 1954 and 1955. As I recall it had its [fol. 2077] peak earnings in 1955, and the prospect was for poorer earnings in 1956.

I believe that that was the primary consideration in reducing what was, I think at that time, our largest investment in the Fund.

Q. You next have a buy of 15,000 on 4/24/56. What was the yield at that time?

A. 4.44.

Q. Can you give me the yield on the succeeding one on the sell side, the 15,000?

A. 5.4, and the next 50,000——

Q. 5.4?

A. 5.4.

Q. That is on 15,000, is it not?

A. I don't have a figure down here for the sale of 15,000, but on the $2 dividend at $40, that would be five per cent. The price over on the right is $40, and it would be a little better than five per cent on the sale of the next 50,000 shares.

Q. Give me the dates on those. On 12/11/56, do you have a sale of General Motors?

A. 12/11/56, the yield here is 4.55.

Q. Then on January 4, 1957, you have a sale of 50,000?

A. That is right.

Q. And the yield on that?

A. It says here 5.4 per cent.

Q. And on February 15, 1957, a 15,000 sale.

A. As I said, I don't have any yield down for that figure, but it would be about five per cent. On the next one it would be a little better than five per cent.

Q. And on the 20,000?

A. 20,000, I do have five per cent. I think the $2 dividend figure goes all the way through that period.

Q. And the yield on the buy of 25,000 shares on 9/19/58?

A. 4.35 per cent.

Q. 4.35 per cent?

A. That is what is written down here.

[fol. 2278] Q. Do you know, sir, whether on the buy and sell transactions over the period of time covered by that examination your trading reflected a profit?

A. Reflected a profit? I think all of our sales were at a profit.

Q. I mean, as between having held those stocks and having retained them, is that calculation of net change in your position of some 5,000 of GM over that period of time and transactions in the order of 325,000 shares, I want to know if you have made a calculation that would indicate whether or not that trading was profitable compared to what it would have been if there had been no trading in the period.

A. I don't call it trading, but all of the sales were to our advantage because, although in a number of instances, not all of them, the present price is higher than the price then, our asset value is even higher than that, and so is the Dow-Jones industrial average.

Except that there was a mistake, and on that same basis we are talking about, we would have been better off not to have bought General Motors in September.

Q. You can't determine or you have not determined, I should say, whether or not the Fund would have been better off if there had been no transactions during that period?

Mr. Horsky: He has just answered the question.

By the Witness:

A. The Fund is better off by having sold General Motors on balance during that period because the stock has not acted as well as either the asset value of the trust with

which we compare every stock we own, nor has it acted as well as the Dow-Jones Industrial average, taking any one of those stages at which we sold General Motors.

[fol. 2279] Q. I take it, then, am I correct in understanding you made no computation as to whether or not the Fund would have been in better position just with respect to General Motors had it held the stock and not made any transactions?

Mr. Horsky: I object, your Honor.

By the Witness:

A. I gave you the answer in the plainest form I could, I thought. The Trust is much better off by virtue of having sold those General Motors rather than retaining them. That is just as far as comparing the market performance of General Motors with the performance of the market as a whole.

Now, perhaps the other side of the question which you may be after is you would have to know what we did with the money, and we did——

Q. I don't think we can go into that in this time.

A. Well, that would be the ultimate answer, what happened to the proceeds of the sale of 50,000 General Motors. I don't know. If you consider the number of stocks that we deal in every year, I can't tell you, but as I said before, it is a matter of relative market performance that counts, and we are ahead of the game on General Motors.

Q. I take it from what you say that you do not generally engage in active trading back and forth with stock, but you are primarily interested in the long term prospects of these securities?

A. That is right. We are long term investors and do not trade.

Q. So you are relatively immune to the short swings in the market?

A. We are not immune because even short swings, any swing in the market affects the asset value of the trust. [fol. 2280] We change every day with every change in the market. I would say we are not concerned or worried or whatever the attitude you want to take about short term swings in the market. We have a longer look than that.

Q. I take it then that you try to purchase securities on those occasions when you think the market does not reflect the intrinsic prospects in the security?

A. The matter of timing the purchase of the stock is the most difficult thing in the investment business other than the timing of sale. We congratulate ourselves every time that we buy stock before its real intrinsic worth and value becomes known to the public.

The term in our investment policy which says buy stocks of improving quality really emphasizes that point, that some of the most attractive stocks may look as though they were poor quality today, but if you can buy them as the swing changes, new management, new something, new products, that is one of the most satisfactory forms of investment I know of.

Q. Have you considered the impact of the elimination of the intercorporate dividend tax on GM's earnings that is paid currently by reason of their being passed through du Pont?

A. I am aware that the intercorporate dividend tax exists, and I think it would be a fine thing for du Pont and General Motors, in fact for all companies, if such a tax didn't exist at all.

Q. Well, in making your analysis of the attractiveness of du Pont, for instance, did you consider that as a component in your judgment, the advantage that would accrue by reason of the elimination of that tax?

[fol. 2281] A. I did not consider it a factor of any great significance, because the tax saving, as I understand it, on a per share basis is small, and in our own situation, I believe it is something like fifteen or sixteen cents a share for the corporate holder.

Well, our cost to us of the General Motors that we have received will be du Pont's $2.10. We don't have that intercorporate dividend monkey business.

Q. As I calculate it for each share of du Pont that you have upon receiving General Motors stock you would be entitled to, each year you would get an additional twenty-two cents dividend per share of du Pont, or an additional sixteen cents for each share of General Motors you receive, in addition?

A. Well, not necessarily. Now once we have the two pieces of paper, we have General Motors in one hand and du Pont in the other, General Motors pays, for example, its regular $2 dividend, I don't know whether du Pont will

pass on in addition to what it has been the so-called savings from the intercorporate dividend tax.

Q. It wouldn't be up to du Pont to do that if you own GM directly?

A. I own the du Pont now, and I am getting $6 or $6.50 on the du Pont stock. When I have the two pieces of paper, I will have $2 on the General Motors or two times the 1.38, and it will depend entirely upon du Pont's earnings and prospects as to whether they will pay enough or more to make the whole package add up to the $6.50 again.

Q. Well, there will be no reduction in the amount of the dividend on General Motors by reason of it having passed through du Pont, will it?

A. There will be no reduction involved, but I don't know whether I will get any more money or not. It would depend on the dividend policy of the two companies after this is all done with.

[fol. 2282] Q. Well, at the present time the amount of the dividend that du Pont, the earnings that du Pont realizes on its GM securities are something to be paid out or withheld at the discretion of the Board of Directors of du Pont, isn't that correct?

A. Well, I imagine.

Q. Isn't that correct?

A. Subject to the discretion of the du Pont directors? I would imagine so, certainly.

Q. So if you have General Motors stock directly, any General Motors dividends that were declared, you would receive, and they could not be withheld by the du Pont Board of Directors, is that right?

A. Well, I——

Mr. Horsky: I object. I think this is merely argument with the witness. I don't believe it accomplishes a thing.

Mr. Owens: If your Honor please, I am asking if he has taken these factors into account in forming his judgment.

Mr. Horsky: He has answered that a long time ago.

The Court: I think it has been covered.

By Mr. Owens:

Q. You testified, Mr. Moses, that you thought on the basis of your analysis that the increase in volume of General Motors stock and what you think would be a shrinkage

of demand in General Motors stocks would have a depressing effect upon the price of General Motors. Did I state that accurately?

A. Well, I don't think I said that with respect to—I referred to the shrinkage in demand for du Pont, with the specific idea that a person would not buy willingly a tax liability, and that there would be increased du Pont sales by virtue of the tax problems of the du Pont stockholder, and the combination would, well, it seems to me that it would have an effect on the market.

[fol. 2283] Q. That is the du Pont stock?

A. Yes.

Q. Now, didn't you testify there would be a depressing effect upon General Motors stock?

A. Well, I referred to various reasons why there would be a depressing effect on General Motors stock, but I don't know whether I referred to any shrinkage.

Q. You didn't consider shrinkage of demand, is that correct?

A. I don't see why anybody would buy General Motors under the conditions imposed by the Government judgment until they felt that it was fully discounted, as we say, or fully reflected in the price.

Q. The only condition that you have mentioned as a depressant on General Motors by reason of the Government's judgment is its inability to do equity financing. You now think there is some other reason?

A. No. My testimony is very, I think, the greater part of my testimony was devoted to the fact that I considered that the sales of General Motors by the trustee on a 10-year basis and on a 20-year basis, and the sales by du Pont stockholders of the General Motors which they received, for reasons of needing cash, tax money, and maybe they had too much, that those things would have a depressing effect on the price of General Motors stock. That is what I said.

Q. Now, have you made any study as to the extent of that price depression?

A. I believe I said this morning that I had made no studies of the exact extent, precise extent, in terms of percentages or dollars as other people have done here, as to how far the impact would go.

Q. Do you think it is important to be able to measure the extent of that impact?

A. I would like to be able to measure that. I don't feel that I am a market expert and I don't feel that I am qualified. A lot of us sit around and guess about this kind of [fol. 2284] thing, but I have merely stated that because I feel that the impact will be there for reasons that I have outlined, that I want to sit back and watch and wait until that these stocks are at prices which discount these factors.

Q. Well, now, we are just talking about General Motors.

A. All right, General Motors.

Q. The only depressant effect you have been able to indicate is this inability to do equity financing.

A. No, it isn't——

Mr. Horsky: I object, your Honor. We have gone over this forty times.

The Court: Well, this is repetitious. Sustain the objection.

By Mr. Owens:

Q. Did you give any consideration, sir, as to whether or not the depressant effect would be greater or less on a stock depending upon whether it had a high or a low turnover ratio?

Mr. Horsky: I object, your Honor. I think this is just going to get us into interminable trouble. This is not within the scope of the direct.

Mr. Owens: Your Honor, he testified there is a depressant effect by reason of the increased volume.

The Court: Overruled.

By the Witness:

A. The question is, I believe, did I take into consideration the turnover ratios?

[fol. 2285] By Mr. Owens:

Q. Are you familiar with the term "turnover ratios"?

A. I am familiar with it.

Q. Did you have occasion in preparation for your testimony to read the testimony of Mr. Herd or Mr. Pippin?

A. I did not read the testimony of Mr. Herd. I was

present in this room while Mr. Pippin testified, but I do not recall all he said.

Q. Well, did you give any consideration, sir, to whether or not the depressant effect would be greater or less, depending upon whether the security, the supply of which was increased, had a low or high turnover ratio?

A. I do not think turnover ratios are significant, and I have never taken them into consideration in any work I have done during my career.

Q. You do not consider it significant?

A. It has not been significant in the work I have done; therefore, I have not had any reason to study them or use them, and I have not done so in this instance, either.

Q. Are you acquainted with the studies of the Fulbright Committee on the stock market?

A. Well, I am aware that such studies took place and some people in my organization had a part in supplying the figures for it, and I have read outlines of what transpired at the time, but I am not qualified to say that I know what was said or that I was involved in it, or—in fact, I am just not actually familiar with it.

Q. Well, do you recall any consideration being given to the question of the relative immobilization of securities as a result of the increased percentage of holdings by institutional investors?

A. Yes, I am aware that that was a major—well, at least [fol. 2286] a topic of conversation or discussion in the Fulbright reports, and it comes out from time to time and in various places, with public u[illegible]ances of one kind or another.

Q. Did you give any consideration to that factor in relation to what the relative increase in demand would be for General Motors in the event there were any price decline?

A. I considered it in this sense, in a negative one, if you like. I think that despite the fact that there may be a shortage of high quality blue chip securities, the mere fact that additional amounts of General Motors would be made available over and above what is available now, is no reason in the world why anybody will buy it.

We are dealing in 170 different stocks. We own that many combined in the two funds. We must look at, at least that many more. There is no reason in the world why I feel any compulsion to buy General Motors under any con-

dition simply because there is going to be more stock available.

Q. Well, you testified——

A. There are plenty of other things you could do.

Q. You testified, I think, that you could not perceive any latent demand or measure any latent demand for General Motors stock. I am asking you in reaching that conclusion whether you gave consideration or took into account what those studies showed with respect to the relative immobilization of securities, and particularly du Pont and General Motors stock?

A. Well, if I took it into account, I only took it into account in this way, that I do not believe that it will have any bearing or have any help in disposing of the additional General Motors at present prices.

[fol. 2287] Q. Well, do you think it is significant to be able to have a judgment as to the extent to which there will be an increase in demand in the event there is any decline in the General Motors stock?

A. I think it would be very nice if someone could sit down and be able to estimate just how much more General Motors would be bought for each 5-point drop in price. I do not know how you can do it.

Q. There is no statistical way that you know of, is that right?

A. No, I don't.

Q. Is it not true that you make a lot of market judgments for which there are no statistical ways to measure the basis for your judgment?

A. That is a difficult question to answer that way. A lot of, I suppose our judgments, as to whether we should buy or sell a stock at a certain price or not is based upon just experience in the business.

I think, as I said earlier, that the hardest thing for the analyst to do is to relate all of these findings he has made and all this wonderful work he has done to the price of the stock.

There is no substitute for experience, and I cannot put that in any black and white precise terms for you or anybody else.

Q. In making your judgment as to the probable depressant effect on General Motors stock, did you take into account the purchases by General Motors of its own stock?

A. Well, I am aware that General Motors purchases a certain amount of its own stock every year on a regular basis.

Q. Do you know what the quantity is?

[fol. 2288] A. I believe it is in the order of one million shares a year and up. It varies. I understand they do it on a regular daily basis. That has been going on for some time and it is part of the existing situation, part of the market as we know it. It is nothing new.

Q. Well, do you think it has an inflationary effect on General Motors price?

A. I do not like the use of the word inflationary. I think that without that buying power the price of General Motors might possibly be X amount lower than it would be because it is there.

Q. Well——

A. In other words, any buying has some impact, even if it is an eighth of a point.

Q. That is right; now, under that buying there is approximately one million shares a year being bought. That leaves one-half of the quantity of shares that would be required to be sold under the Government's proposed judgment.

Do you understand that?

A. Yes, that is right.

Q. Do you think that there would be any tremendous impact on the market price of General Motors if they discontinued those purchases that would cause you to view it as a depressant the way you have indicated in your analysis you view the depressant of the Government's proposed judgment?

A. I think that if you removed the purchases of one million shares by General Motors from the market that there would be some minor effects.

Q. Minor effects——

A. There would be some effect.

Q. Do you think that if General Motors were to increase their purchases from one million to two million shares a year, that there would be a marked effect comparable to the effect you say will result from the sale of two million shares by the trustee under the Government's proposed [fol. 2289] plan?

A. If General Motors would increase its purchase from

a million to two million shares in the market? We are not talking about the two million shares the trustee has, but whether General Motors would increase their purchases from one million to two million.

Q. My question is, do you think it would have the same effect upon the market, to the same magnitude, as the sale by the trustee of an equivalent amount of two million shares a year?

A. I don't see how I could measure the effect of another million shares of purchasing by General Motors. Done on a careful basis, it would have some effect; it would either support the market or maybe move it up a little bit, as compared with a compulsory selling of two million shares every year for ten years, plus as I said, the more important consideration is the sales by the du Pont stockholders of the shares of General Motors that they get. I think that is more serious than the trustees' sales.

Q. I am trying to separate the elements that have led to your conclusion, sir; and I want to know if you would make a serious change in your investment recommendations if you learned, for instance, that General Motors had decided that it was not going to buy General Motors bonus stock on the market.

A. If General Motors were not going to buy? That has been going on for a long period of time, and it is an inherent part of the trading volume in General Motors now year after year.

Q. Assume that it is discontinued. I am asking you to assume that it is discontinued. Would you make the same careful analysis that you say you have made with respect to what your investment recommendations would be in the event that that would take place?

A. I don't know how much effect it would have.

[fol. 2290] Q. When did you first learn, sir, that those shares were being bought by General Motors on the market?

A. Oh, some months ago.

Q. Some months ago?

A. Some months ago.

Q. Did that cause you to re-assess your General Motors stock in the light of that?

A. No. I didn't give it any particular consideration.

Q. You did not give it any particular consideration? Did

you consider what percentage of those purchases were by General Motors of the total transactions in GM shares on the stock market?

A. Well, I understand it's approximately a million out of—what, eight to nine million a year, on the New York Stock Exchange?

Q. Let me show you Government Exhibit 148, sir.

Have you seen that document before?

A. No, sir.

Q. Would you take a minute to look at it?

A. Yes.

Q. You see, there reflected, I think, the magnitude in percentages that the General Motors purchases are of total transactions on the Exchange, is that correct?

A. That is right.

Q. That does not take into account, as I think you will appreciate, over-the-counter transactions, is that right?

A. Yes.

Q. Now, do you think that those percentages indicate the extent to which the purchases would have a tendency to increase the price of General Motors stock, so that it would be a factor that you should take into account in making your investment analysis?

A. I have no way of measuring what effect this has on the market, and it is not something that we have taken into consideration, and it has not entered into my thinking.

[fol. 2291] Q. It has not entered into your thinking?

A. In my own views, as to where we would buy General Motors stock.

Q. Would you think, sir, that the technique by which those shares were purchased would have an influence on the extent to which it would affect the market price?

A. May I hear that question again?

Q. On the basis of your experience, would you conclude that the technique or the method by which those shares were purchased would have an effect upon the degree to which the market price of GM shares would be affected?

A. I am afraid I still don't understand.

Q. On the basis of your experience, would you have an opinion as to whether or not the influence of those purchases on the market price of GM would vary, depending upon the manner in which the purchases were made; that is, if they were made uniformly day by day in approxi-

mately the same dollar amount and on the basis of whether they were made by creating new highs in the stock, in the bid, or just merely meeting the high or putting in a bid at something less than the market?

A. I think I understand. It is not dissimilar from our own operations, I suppose. The technique that we use, I am sure, is designed to have the impact on the price of General Motors be at the very minimum; and I am not familiar with how they operate, but I am sure they wouldn't want to be responsible for setting new daily highs in General Motors on the market.

Q. Did you discuss with General Motors the prospect of your testifying in this matter?

A. I did not discuss with General Motors the prospects of my testifying in this action.

[fol. 2292] Q. You did not?

A. No, I visited their office, and I don't recall that this point came up; and the only persons that suggested that they might want somebody from our organization as a witness was the du Pont group.

Q. Did the du Pont group bring this factor to your attention—any of the du Pont attorneys?

A. No. The particular point that you made? No. The question of General Motors buying stock for its various plans on a day-to-day basis is something that has shown up in various places.

Q. On the basis of your experience, sir, do you see any reason why sales by the trustee could not be effected in such a manner as to minimize price impact?

A. I think the answer to that question probably is that I would have to be an investment banking expert; an underwriting expert.

Q. In connection with your testimony, did you consult any stock market experts, for instance?

A. No, I did not.

Q. And you did not consult any investment banking experts?

A. No. Strangely enough, I have done all of this work myself, pretty much; I mean nothing outside of our own organization.

Q. So that you have no opinion as to the extent to which the depressant effect that you asserted may exist on the

market could be ameliorated by the technique by which the selling was effected?

A. I think I said earlier that I assume the trustee would try and find and form the very best techniques possible; and the more credit to him if he could in some way dispose of that volume without having any marked effect.

Q. You don't know, do you, whether or not, in fact, there is a technique by which that so-called depressant effect [fol. 2293] that you think will occur can be completely eliminated?

A. I don't know, no. I am not in that business.

Q. I take it that you think that exploration of that area would be an important consideration in arriving at an informed judgment as to the effect of the Government's plan?

A. I think it would be very nice, very advisable for anyone to be able to assess with some degree of accuracy what the effects of any aspect of the plan is, and I wish I would be able to do it.

Q. Isn't it almost a negligence not to take that factor into account in arriving at an informed judgment with respect to this matter?

A. Well, you are entitled to your own opinion.

Mr. Horsky: Which factor are you talking about, may I ask, Mr. Owens?

Mr. Owens: The question of the extent to which the technique of marketing may ameliorate what you consider to be the price depressant.

Mr. Horsky: For him to take it into account?

Mr. Owens: For him to take it into account.

Mr. Horsky: I think he has answered that question.

Mr. Owens: He has told me that I am entitled to my opinion, as I understand it.

Mr. Horsky: That is right.

Mr. Owens: I asked him if he did not recognize that it was almost negligent in arriving at an informed judgment on this subject not to take that into account and not to have gotten the benefit of the advice of market specialists and investment bankers.

Mr. Horsky: I object to that on the ground that it is arguing with the witness.

The Court: Sustained.

[fol. 2294] By Mr. Owens:

Q. Have you considered, sir, in connection with the receipt of the GM dividends, that you would receive on the du Pont stock owned by the Investment Trust, as to whether you would hold them or sell them, or pay them out to your shareholders?

A. I testified earlier that I believe that we would hold the General Motors shares and pay out in cash the cash equivalent of the dividends.

Q. Have you tried to make any measurement of the increased attractiveness of du Pont by reason of the fact that you might obtain the intercorporate savings, savings on the intercorporate dividend tax that is currently paid?

A. I believe you asked me that earlier. I have not taken this intercorporate dividend savings into any consideration in my views on either stock.

Mr. Owens: I have no further questions, your Honor. Thank you.

Mr. Dallstream: I have a few questions, your Honor.

The Court: you may proceed.

Mr. Reycraft: Your Honor, if Mr. Dallstream is going to inquire on his plan, may we cross examine or inquire after Mr. Dallstream completes his examination?

The Court: You may.

Mr. Dallstream: I hadn't thought that I was shutting you off. I offered to go ahead first.

Mr. Reycraft: That is all right, Mr. Dallstream.

Cross-examination.

By Mr. Dallstream:

Q. Mr. Moses, I think you were in attendance some 15 months ago at the first meeting that I held in Boston with [fol. 2295] some of the institutional investors and large stockholders of du Pont, were you not?

A. I was.

Q. And we chatted at that conference, as I recall.

A. That is right.

Q. And have you discussed with me during the last few days some of the phases of the take-down provisions of my own suggestion?

A. Yes, sir, I have.

Q. Have you had occasion to read the report and proposed judgment which I have filed with this court, Mr. Moses?

A. Yes, I have, sir.

Q. Are you familiar with the so-called take-down provisions of that plan?

A. Yes, sir, I am.

Q. Assuming that the Internal Revenue Service issues the ruling that I have requested to the effect that no shareholder of du Pont would realize any taxable gain until and unless he has both applied for and has received permission to take down the du Pont special common and the General Motors shares, have you an opinion as to whether the entry of my proposed judgment would have any adverse effect on the shares of either General Motors or of du Pont?

A. I have.

Q. What is that opinion?

A. I do not believe that your plan would have any particular effect on either General Motors or du Pont. It seems to me that it gives——

Mr. Owens: Excuse me, if your Honor please—I would like to have the witness explain what his understanding of the plan is, so that we can relate his opinions in that regard to what his understanding is.

The Court: You will have a chance to question him.

Mr. Owens: I think we should have some assurance of the witness' acquaintance with the plan.

[fol. 2296] Mr. Dallstream: He has stated that he is familiar with it.

The Court: Yes.

By Mr. Dallstream:

Q. Proceed.

A. As I say, I don't see any marked consequences on either the price of General Motors or du Pont by your plan. As a matter of fact, I think there would be a number of institutions that would like very much to obtain du Pont as a straight chemical stock, free and clear of General Motors, and particularly if they are tax free or have little or no taxes to pay.

I personally prefer the du Pont plan as being the simplest and the most free of all complications, but if we have to have some kind of plan of divestiture such as the Government visualizes, I think yours is infinitely preferable.

Q. Mr. Moses, if the take-down provisions were placed in effect, would you recommend that your Trust, as distinguished from the Growth Fund, apply for permission to take down its allocable portion of the General Motors shares?

A. Well, I can only say that I would recommend that we give very serious consideration to it. You would have to weigh the merits of taking down the General Motors and having the special du Pont common separately, as compared with holding du Pont in its present form with which we have been perfectly happy up to now, and we would also have to consider the advisability of whether we should voluntarily incur a tax liability, however small it may be, on behalf of our stockholders.

I think the best thing about your plan is that it would give us a flexibility of action, an assurance that we could do either one, whatever seemed the best under the circumstances.

[fol. 2297] Q. And you would also be provided a market for the du Pont stock itself which has not theretofore existed, and the ability to buy in after you had sold your present du Pont, to buy into the special common?

A. Well, I presume that a market would be established without too much difficulty for the du Pont special common, and one could sell the du Pont as it is today in the first instance and buy the du Pont special common without having to go through the procedure of taking down the General Motors stock and then selling it.

Q. Precisely.

Have you an opinion now as to what you would do in the event of the adoption of the take-down provisions with respect to the shares of du Pont which you have in the Growth Fund?

A. Well, the Growth Fund, it seems to me, such a plan as yours would give us an opportunity to have du Pont as a straight chemical stock.

As you heard me testify earlier, we don't own General Motors in that fund because we view it as a cyclical company rather than a growth one.

We could take down the General Motors and sell it or, as I said, we could sell the du Pont first, and reinvest the proceeds in the du Pont special common.

I think a lot would depend on the market condition at the time as to what we would do, but I think it would be very suitable for the Growth Stock Fund.

Mr. Dallstream: Do you wish to ask any questions?

Mr. Horsky: No.

[fol. 2298] Cross-examination.

By Mr. Owens:

Q. Mr. Moses, would you describe to me what your understanding is of Mr. Dallstream's take-down plan?

A. My interpretation of Mr. Dallstream's take-down plan is that we, for example, our Growth Stock Fund with 17,000 shares of du Pont could go to the du Pont Company and request or take-down, as the term is, General Motors stock, which is about—well, 1.38 times the 17,000, it would be 22,500 or an amount in that order. We would be allowed to have that.

We would incur, it would be taxable income to us just as though we received it as a distribution under your plan. Then we would have in addition to that this special du Pont which would differ from the regular du Pont in that it was separate from the General Motors.

Now, I believe there are some other provisions in Mr. Dallstream's plan of, well, not exactly minor nature, but this is the main part of the plan that I am interested in, the take-down provisions.

Q. Is that the extent of your knowledge about the plan?

A. That is the principal part of the plan as far as I remember it.

Q. Could you tell us the extent of the consideration you have given to that plan?

A. When Mr. Dallstream's plan was first announced, we received——

Q. When was that, sir, do you know?

A. Well, as I said, I have read everything I could in connection with this and I can't separate one time from another. But he sent, I believe he did anyway, because we received a copy of his plan when it was first typed and printed up, and we had our industry man, who follows

[fol. 2299] the automobile business, give us a summary of the principal differences between his plan and the du Pont plan itself.

That was my first acquaintance with it. Then subsequently when it became clear that I or someone would be a witness in this case for du Pont, I read all of the plan. Now that reading of all of it was, I judge, several months ago. It was before the first of the year anyway. Since I have been here—I was here two days last week as you know—and the other day, and I have discussed with Mr. Dallstream some further aspects of this plan. It is just——

Q. Did you discuss such plan with the attorneys for du Pont?

A. We have touched on it in our conversations, yes.

Q. Could you place those conversations in point of time as to when you first were acquainted with Mr. Dallstream's plan? Were they before or after?

A. Well, it is difficult, this timing business is a difficult thing. I have had a number of discussions with Mr. Horsky in particular about testifying here, and we touched on Mr. Dallstream's plan in those conversations.

Q. Did you discuss the plan with du Pont attorneys prior to your receiving a copy of the plan from Mr. Dallstream?

A. Prior to receiving—no.

Q. You didn't consider such a plan or a similar plan?

A. No, I didn't consider such a plan as Mr. Dallstream's or a similar plan, if there is one, until his plan was received in our office and reviewed, as I say, by one of our men, and then when I found that I was going to be here at some point, I did my best to cover as much of that material as possible.

Mr. Owens: Thank you.

[fol. 2300] Mr. Horsky: I have no further questions, your Honor.

(Witness excused.)

The Court: Court stands recessed for ten minutes.

(A recess was taken.)

The Court: Proceed, counsel.

Mr. Horsky: Your Honor, I neglected to offer du Pont Exhibits 45 and 46 for identification. I now offer them.

Mr. Owens: No objection, your Honor.

The Court: They are admitted.

(Said exhibits, so offered and received in evidence were marked du Pont Exhibits 45 and 46.)

Mr. Horsky: The du Pont Company will call Mr. Lenz.

WINTHROP C. LENZ, called as a witness on behalf of the defendant E. I. du Pont de Nemours and Company, having been first duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Horsky:

Q. Will you state your full name and address for the reporter, please?

A. Winthrop C. Lenz; 77 Prospect Hill Avenue, Summit, New Jersey.

Mr. Horsky: Your Honor, I ask the Marshal to put the book of exhibits on your desk that we will be referring to during this examination.

By Mr. Horsky:

Q. With what securities house are you connected, Mr. Lenz?

A. Merrill Lynch, Pierce, Fenner & Smith, Incorporated.

[fol. 2301] Q. What is your position there?

A. I am Vice-President in charge of the Corporate Buying Department of the Underwriting Division.

Q. How long have you been a Vice-President of Merrill Lynch?

A. I have been a Vice-President since January 12 of this year, having been a partner of the firm since January 1, 1948.

Q. What was your professional experience, Mr. Lenz, before you were connected with Merrill Lynch?

A. I have been with the firm and/or its predecessors since 1928; first, in the Order Department; for about eleven years in the Statistical Department, which is now the Research Division; and for the remainder of the time in the Buying Department of the Underwriting Division.

Q. Before we turn to Merrill Lynch, will you tell us something of your educational background?

A. I graduated from Princeton University in 1928 with a degree of Bachelor of Science.

Q. Will you describe the nature of the activities—is it proper to call it "Merrill Lynch?" Is that a proper abbreviation?

A. That is correct.

Q. (Continning)—of Merrill Lynch, and tell the Court something of what aspects of the securities business it is engaged in?

A. Merrill Lynch is engaged in practically all phases of the securities business, and in addition is engaged in the commodity brokerage field.

We are the largest security commission firm; the largest commodity commission firm; and one of the ten largest underwriting firms from the standpoint of business written over the past five years.

Q. How many offices does Merrill Lynch have?

[fol. 2302] A. We have 126 offices; 120 in the continental United States and 6 foreign.

Q. How many different cities are you in, if you remember?

A. 108.

Q. How many Vice-Presidents are there presently?

A. There are 68 Vice-Presidents.

Q. Is that the number of general partners there were prior to your incorporation?

A. There were three additional partners, one of whom is now Chairman of the Board; another one President and another one Chairman of the Executive Committee, making a total of 71 in all.

Q. How many employees does Merrill Lynch have?

A. Approximately 6,500.

Q. I think your last annual report stated, Mr. Lenz, about the percentage of the trading in round lot volume on the New York Stock Exchange which is done by Merrill Lynch. What was that percentage?

A. We last year did about 13.7 per cent of the public round lot volume, and approximately 21.1 per cent of the odd lot volume.

Q. Could you estimate the approximate percentage of your closest competitor, for comparative purposes?

A. I cannot, Mr. Horsky. I would have to only guess at that figure and I think I had better not.

Q. It isn't very close, is it?

A. Probably not.

Q. How many customers does Merrill Lynch have, sir?

A. Somewhere around 425,000.

Q. Would you define what you mean by customers in that figure?

Well, those are people with whom we have done some business over the past three years. If you took only active accounts that had perhaps done business every year it would be somewhere in the neighborhood of 325 to 350 thousand.

[fol. 2303] Q. Are these people to whom you regularly mail literature, for example?

A. That is correct, sir.

Q. The 400,000?

A. The 400,000.

Q. What percentage of the monthly installment plans does Merrill Lynch have, do you know?

A. According to our last year's report just out we did 58 per cent of the 82,000 monthly investment plans currently outstanding.

Q. Would you state briefly what a monthly investment plan is? Perhaps we ought to have that in the record.

A. A monthly investment plan is a device whereby small and sometimes large shareholders can buy stock regularly on a dollar amount basis, the minimum being $40 for every three months, but it can go as high as about $999 per month.

The purchases take place in dollars so that as the stock goes down more stock is bou n at the higher levels, and that mathematically works out over the long run, if a secon vehicle is selected, in favor of the purchaser.

Q. Each plan contemplates the purchase of a single security, is that right?

A. Each plan contemplates the purchase of a single securi y.

Q. Do you happen to know how many there are for General Motors?

A. There are two thousand, six hundred and some odd plans for General Motors.

Q. In Merrill Lynch?

A. In Merrill Lynch.

Q. Yes.

A. That is correct.

Q. Now, as a vice-president, could you give me a little more detail on what part you play in the various activities of the firm?

A. I am in charge of the corporate buying department, which is the department that investigates the various industries and companies which we feel should be prospective underwriting clients; draws up financing plans, negotiates [fol. 2304] a certain plan or offe ng with the company officials; works on all the papers wit.. the attorneys and the lawyers pertaining to registration with the Securities and Exchange Commission and does all the work necessary to bring the stock or bonds, as the case may be, to the point of sale.

In addition, we act as agent on behalf of corporations in the private placement of various types of securities with institutional purchasers.

Q. Could you make an estimate, Mr. Lenz, of the number of common stock issues, including secondaries, that you have had personal connection with during the time you have been with Merrill Lynch?

A. Well, there would be literally dozens of issues, not all of which I would have worked on solely, but usually in conjunction with other members of our division. As in the case of most investment banking firms, I have worked on parts of almost every deal that has ever come into our office.

Q. Would it be a fair statement that you have participated in some degree in practically every issue that Merrill Lynch has handled?

A. Almost. There might be a few exceptions where I had nothing to do with them whatsoever if I was tied up on some other matter at that particular time.

Q. Now, have you read the plan proposed by the Government to be the judgment of the Court in this case, Mr. Lenz?

A. Yes, I have.

Q. Have you, at the request of the du Pont Company, made a study of the probable consequences which could reasonably be expected to follow if that proposed judgment

were to be approved by the Court and put into execution?

A. Yes, I have made such a study.

[fol. 2305] Q. On the basis of your study, have you formed an opinion as to what the probable effect on the market for the common stock of General Motors would be if the Court were to approve and put into effect the Government plan?

A. Yes, I have.

Q. What is that opinion, Mr. Lenz?

A. I believe that if the Government plan is put into effect there will be a substantially adverse impact on the market for General Motors common stock.

Q. Now, you are aware, Mr. Lenz, that under the Government plan there are some 20,000,000 shares of General Motors common stock which are to be sold by the trustee, are you not?

A. Yes, I am.

Q. Would you explain what the significance of that aspect of the Government plan in reaching your opinion on the adverse effect on the General Motors common stock is?

A. We have studied all of the various large offerings since 1936 and 1937 of all types and find that the only offering which would exceed in annual amounts the two million shares of General Motors, where there was a previously existing market, was the Upjohn issue, which was sold late last year.

Other than that, the only offering of a secondary nature, which is the only type comparable, in my opinion, with these blocks, which would have to be offered for sale by the trustee, was the Ford Motor issue of 10,200,000 on January 17, 1956, and aside from that offering the only other issue of comparable size would be the issue of 2,900,000 shares of Universal Oil Processes, which was recently sold.

None of these other issues were sold except on a one time [fol. 2306] basis, except that there is now, as you all know perhaps, another Ford Motor issue in registration.

The magnitude of the size of this operation, handling the sale of twenty million shares over a ten-year period, is something that we have never coped with in the investment banking business, and consequently estimates are being made only as a matter of careful market judgment;

there is no real, absolute, scientific way of determining the exact effect to any specific degree.

Q. Well, perhaps you have covered this in your answer, but let me call to your attention du Pont Exhibit No. 32.

Have you seen that before, Mr. Lenz?

A. Yes, I have. I have studied this exhibit.

Q. Do you regard, Mr. Lenz, the impact figures which are shown on this chart for the issues as to which there was a prior public market, that is, the first eight issues, as any true measure of what the likelihood would be of the trustee sales under the Government's proposed plan?

As I say, you may have covered this, but I would just like to be specific about it.

A. Well, I think the impact of the trustees' sales under the Government plan would be far greater than the impact indicated for these various other issues, for the reason that when the first offering is made all the prospective buyers will know that an additional eighteen million shares are overhanging the market, and consequently be rather wary of making a purchase unless they can do so under very favorable price conditions.

Q. So the impact, you believe, would be larger than that indicated for these issues, is that right?

A. I would say the impact would be substantially larger.

Q. Now would you explain in a little bit more detail why you think that the Ford Motor Company issue of 1956, [fol. 2307] which you referred to in your previous answer, would not be comparable to the trustee's offering?

A. The Ford Motor Company has been an American legend for many years, and we have had all types of customers of our own firm on notice with us that if and when it ever came to market they wanted to buy stock.

In addition to that, at the time that the offering was brought to market, there were only two high grade diversified automobile company stocks listed on the New York Stock Exchange—General Motors and Chrysler; and for diversification purposes alone, investment trusts and other institutions, as well as individuals, sought to make purchases. Over and above that, the offering was sold at that time at an exceedingly favorable price times earnings basis, a little under eight times, whereas, for example, on the date of sale, General Motors was then selling at about 10.2 times.

One point further, the ten million, two hundred thousand shares of Ford representing some six hundred and fifty-eight million dollars was a small amount in relation to the existing outstanding stock of General Motors multiplied by the price at that particular date. So that, whereas the offering strained the capacity of the underwriting industry, there being some 722 members of the underwriting account, it was possible to obtain sufficient interest without too much difficulty at that point for the purchase of the ten million, two hundred thousand shares.

Q. I think that answers my question, sir. Thank you.

Mr. Horsky: Will the reporter please mark this for identification as du Pont Exhibit 47?

[fol. 2308] (Thereupon said document was marked Defendant du Pont Exhibit No. 47 for identification.)

By Mr. Horsky:

Q. Was Merrill Lynch one of the managers in the Ford issue, Mr. Lenz?

A. Merrill Lynch was one of the seven managers of the Ford Motor Company issue.

Q. Did you consider also in reaching your judgment on the effect of the trustee's sales, Mr. Lenz, the sales of Aluminum stock pursuant to the judgment of the court in that case?

A. Yes, we did.

I would like to add something in that respect.

Unfortunately, the data available in the Aluminum case was not as well documented as the data presented by the Government and by the du Pont Company in this case, so it was very much more difficult to ascertain with any reasonable degree of accuracy the effect of the various distributions made in that case.

Q. Well, let me ask you to look at that exhibit which I have placed there on the ledge and which has been marked du Pont Exhibit 47 for identification.

Was this exhibit prepared under your direction, Mr. Lenz?

A. Yes, it was.

Q. As I read the data which is on the typed insert, the stock prices are the closing prices on the Friday nearest

the end of the month, of each month. Is that consistent with the way that Merrill Lynch keeps its own records of prices for its own internal purposes?

A. Yes. Our Research Division keeps all of the data from which this chart was made and has done so over a long period of time.

Q. Is the composite index, which is reflected by the zero line on the chart, a composite index derived from the data [fol. 2309] which you maintain in the regular course of your operations at Merrill Lynch?

A. Yes. The aluminum index of the four stocks is an index which we use every quarter, and is also used on a day-to-day basis by our Research Division; but every quarter appears in the publication which we issue called the "Security and Industry Survey," which is made available to our various customers.

Q. Now, on the basis of this exhibit—well, when it says on here the source of data is the Wall Street Journal, is it correct that that is the ultimate source from which your Statistical Department compiled its own information?

A. Only the closing prices, as indicated on the Friday nearest the end of the month, are secured from the Wall Street Journal.

Q. Are you satisfied that this exhibit is accurate, Mr. Lenz?

A. Yes, sir.

Q. Now, would you explain what the exhibit shows you in terms of the price movements of these four securities?

A. I think it is fairly obvious that the relative price action of Aluminum Limited is far worse than the average of the index itself.

Q. And very much less favorable than that of either Kaiser or Reynolds, I take it?

A. Correct.

Q. To what extent, Mr. Lenz, do you believe that this relatively unfavorable market action of Aluminum Limited as contrasted with the composite or the other stocks was due to the sales which were made pursuant to the court judgment?

A. We have wrestled with that problem, Mr. Horsky, quite arduously over a period of time. I might say the judgment of our research specialist who handles the alu-

minum stocks is that it definitely had had an adverse market action.

[fol. 2310] The degree of that adverse action is very difficult to estimate, even to a rough approximation, but looking at the timeing of the offering, actually they had a ten-year period for disposal, it appears to me that despite the fact that there were very definitely other adverse factors, that there was a fair degree of decline due, or poorer market action—I shouldn't say "decline"—poorer market action than the other stocks, due to these various frequent sales of the stock under the decree.

Q. Did you also consider, Mr. Lenz, in reaching your judgment the facts surrounding the offering of the Sloan Foundation stock in 1956, the so-called Sloan secondary?

A. Yes we did. We realized that this offering, was only about two-thirds the size of the two million shares to be offered annually by the trustee, unless one or the other of the offerings is postponed to a later date, and we realized that although this was an isolated case, it probably came as close to the type of annual offering that we could expect from the trustee.

The market on General Motors in this offering of around 1,300,000 shares in April 1956, closed, if my memory serves me correct, at $46.00 on the day before the announcement of the offering; and at the offering date the price was 43¾. Consequently, there was a decline or an impact from the one day before the announcement to the date of the offering of slightly less than 5 per cent.

Q. Do you remember, sir, what happened to, say, the Dow-Jones Index during the same period?

A. I have these figures, I think, here. I know that the Dow-Jones Index between those two dates, from one date to the next, showed a very, very slight minor increase.

[fol. 2311] The day before the announcement the Dow-Jones Industrial Averages were 515.10, and on the date of the offering, 516.12.

Q. Thank you. Now, in further consideration of your opinion, Mr. Lenz, did you consider the various offerings of stock which have been made to stockholders by way of stock rights?

A. Yes.

Q. Let me add to that——

A. We studied all of the——

Q. (Continuing) And let me add to that whether you saw du Pont Exhibit No. 30?

A. Yes, we did. Even prior to the knowledge of this exhibit, we had ourselves reviewed all of the various rights offerings during this entire period to satisfy ourselves that an issue hadn't been omitted from the list.

Q. How relevant do you think those are to the problem of determining the market consequences of the Government's plan, sir?

A. I don't think a rights offering is comparable in any manner with a secondary offering, particularly a secondary offering of such a large amount of stock on a constantly recurring basis.

In the first place, these rights offerings show discounts from the existing market running from 11 per cent to almost 35 per cent. In other words, the stock was made attractive to the existing holders and to the outside holders for purchase.

In addition, through the use of rights, a stockholder or an outsider can buy stock on the offering through rights on only a 25 per cent margin basis, whereas a 50 per cent margin pertains to other types of stock purchases through security brokerage firms.

[fol. 2312] There are one or two other factors in connection with the rights offering which I feel are important.

The existing shareholder must subscribe in order to maintain his proportionate interest in the company. Generally the offerings are on a basis whereby he needs to put up only a very small amount of additional cash to maintain that proportionate interest, and consequently it is not generally too hard for him to do so.

The fact that the offerings are at a big discount price brings in a big outside interest. I believe Mr. Scanlon of the Telephone Company mentioned the fact that in the rights offering of the Telephone stock half of the stock was taken up by outsiders other than the stockholders of the company itself.

Q. Let me ask you this, Mr. Lenz. Are the layoffs which take place by underwriters in connection with the rights offering comparable to sales which are made in a secondary offering?

A. There may be some slight similarity, but there are a number of very important dissimilarities.

The major underwriting firms generally follow a practice, many of them, of going short, selling stock initially during the course of the layoff period, and then buying rights at a later date against the shares sold.

This enables the manager of the underwriting account to have some control of the market, to have some support for the purchase of rights, and/or stock.

In a secondary offering you can go short, it is true, but you can only do so after all of the stock is sold.

Q. Thank you.

Now, you mentioned a bit earlier in your previous answer that American Telephone & Telegraph rights offering. [fol. 2313] Did you consider the whole financial picture of the raising of money by the telephone company which has gone on since World War II?

A. Yes, we did.

Q. What relevance, sir, do you think that has to the solution of this problem?

A. I can't see any comparison whatsoever between the way the telephone company has raised their new capital and the problem presented by the sales of the trustee and the possible additional sales from the existing du Pont shareholders who obtain General Motors stock.

The only common stock offering which the telephone company had in recent years is the one for ten rights offering at $100 a share, while the market for the stock was $182, or a discount of over 45 per cent.

So that obviously anybody in his right mind could see that the stock would be picked up even if for any reason a calamity happened.

The remaining moneys were raised through convertible debenture issues which were offered to shareholders in various ratios, but beginning at a $100 debenture for each six shares of stock, and then gradually working up to a larger number of shares over a period of time.

The convertible debenture is a completely different breed of cat than a common stock offering in that it appeals to a different type of investor, the institutional investor, and over and above that a shareholder or other prospective purchaser can buy these convertible debentures through brokerage firms on only a 25 per cent margin, and through banks frequently at only a ten to fifteen per cent margin,

so that the requirements in the form of cash to be put up are rather small in relation to the amount of purchase.

[fol. 2314] Q. You have, I suspect, already answered this question, but let me make it more general.

Do you think that debentures or, rather, the quantity of debentures that have been sold or may be sold has any relevance to the problems of marketing two million shares of General Motors stock a year?

A. I don't think the debentures that have been sold have any relevance to the problem whatsoever. Debentures appeal primarily to the institutional investor. They bear a fixed rate of return. They are not dependent primarily on earnings or fluctuations in earnings.

The amount of money available for purchases of senior securities of that type, fixed interest bonds, is far in excess of the amount available for stocks.

Q. All right, sir.

Now, let me take that. Let me direct your attention to the feature of the Government plan which provides for the annual distribution to the stockholders of du Pont, other than Christiana, Delaware, and the stockholders of Delaware, of approximately 4,300,000 shares of stock per year.

In reaching your opinion, did you consider that this would have an adverse effect upon the market price of General Motors?

A. We think it would have an adverse effect.

Q. All right. How many shares—strike that. How many of the 4,300,000 shares which are distributed each year, are to be distributed each year, did you assume would be sold, Mr. Lenz?

A. Well, we studied very carefully the tax data prepared by National Analysts.

[fol. 2315] Q. Pardon me. May I interrupt? I would like to ask you if du Pont Exhibit 25 is the data to which you refer?

A. That is correct.

Q. You can keep it there.

A. Specifically, according to their estimates, there were 231,000 individuals altogether, of whom roughly 190,000 were individuals that were not trust beneficiaries. These 190,000 owners owned some 14,600,000 shares of du Pont and the individuals that were trust beneficiaries in the

amount of 41,432, owned an additional 10,606,000 shares, a total of slightly over 25,000,000 shares of stock.

These holders, the individuals that are not trust beneficiaries, and the individuals who are trust beneficiaries, are entitled to slightly over 3,400,000 shares of General Motors per year. The significance of these two groups of holders primarily revolves around their particular individual tax problems.

A great many of the individuals that are not trust beneficiaries are in tax brackets running from 30.4 per cent up to 80.1 per cent, and the average tax rate is 50.1 per cent; whereas, the individuals that are the beneficiaries of the trust, following a similar method of computation, have an average tax incidence of 67.1 per cent.

It is our feeling that a great many of the holders who are individuals, not trust beneficiaries, as well as those who are trust beneficiaries, where the tax incidence exceeds 50 per cent, will be sellers of the stock——

Q. Of the General Motors stock?

A. Of the General Motors stock.

Q. Did you come to any kind of a rough or rounded [fol. 2316] figure as to what you thought it might be per year?

A. We made all attempts at scientific analysis without any complete success. I do not think there is any completely accurate method of computation; but it is our feeling, based on the difference in tax liability between selling and taking the capital gain or absorbing the current distribution on a current taxable basis, that at least one million shares per year would be sold by these holders.

Q. How did you assume in arriving at your judgment, Mr. Lenz, that these shares would be sold, and at what times during the year did you assume they would be sold, the General Motors shares sold by the distributees, I am speaking of now?

A. We assumed that the sales would take place primarily on the New York Stock Exchange without any method of group guidance, and that it was to the benefit of each distributee as he got his stock to act as fast as he possibly could to get rid of the stock prior to the deluge that might take place when the other people decided to do the same thing.

We feel that the individual would act on his own rather than join any group, if such a group were possible—and I do not think it could be done successfully, because he can do it much cheaper, he can act faster, and in all probability he may get a better price by being the first one out.

Q. Well, do you think then the selling would take place by and large at or around the time of the distribution, is that what you are saying?

A. Well, I think that it would take place at that time for the very simple reason that the tax to the recipient will be based on the price at the time he receives the stock.

If he withholds his sale for a while, he may, in addition to having an enormous current income tax, also have a [fol. 2317] capital loss on the stock which he has received. It is also possible that he may have a profit, but I think the chances are far in excess of anything else that he will absorb an additional loss.

Q. One of the earlier witnesses in this case, Mr. Lenz, suggested that there might be a possibility of reducing this type of individual selling by organizing a secondary for these people to join, which they would be solicited to join. I think you said that you do not think that would be possible.

Would you explain that a little bit more?

A. Well, I have given some consideration to that thought because I think anything of that sort would have merit, because it would alleviate to some extent the impact on the market that would be caused by disorganized selling. The mechanics of organizing such a group are so vast and huge and the time that would be consumed so long that I think it might make it inadvisable for many individuals to join such a group.

Secondly, the underwriting spread or commission in the event that a group could be formed, a very substantial group, would probably be somewhere in excess of four times the stock exchange commission. To be specific, if we take General Motors at $45, the stock exchange commission, I believe is 41½ cents.

In all probability, if you had a large group and had, let's say, the whole million shares, the commission might have to be somewhere in the neighborhood of $1.60 to perhaps even as high as $2. So that the differential in the net

price to the seller would be substantial just from the difference in the selling cost alone.

Over and above that, the individual who acted first would [fol. 2318] be able to get the benefit of the market prior to the impact of the offering, and we have seen in all these past offerings that there has been some impact on the market as a result of the announcement of the offering, and then the offering itself.

Q. Does the recent experience with the Upjohn secondary give you any clues toward what you have just said? Is that a relevant precedent?

A. Probably not too good an example, Mr. Horsky, because we were dealing there—rather, Morgan Stanley was dealing with only a limited group of large individuals, most of the accounts being in one trust company where they did not have to travel very far or do much work to get them pretty much all together.

Even there, the individuals who did not join in the group and give a blank check to the committee that decided the price at which the offering was to be sold, served to partly disorganize the market after the offering.

Over and above that, there were some sales prior to the offering, which did not have to be registered, which gave a rather fictitious market to the stock. It made it very difficult for the manager of the account to price the offering properly.

Q. How many individuals were involved in the Upjohn group that did go into the secondary, do you remember?

A. I cannot remember that, Mr. Horsky, but my recollection is somewhere in the thirties or forties.

Q. Thirty or forty people?

A. Thirty to forty people. Individuals.

Q. Yes.

A. Or trustees.

Q. Now, what in your judgment, Mr. Lenz, would be the effect on the existing stockholders who already owned Gen- [fol. 2319] eral Motors stock of the selling by the trustee and the selling by these other stockholders?

A. I believe that the problem of the existing General Motors shareholders may be the most difficult problem involved in the Government proposal. There are hundreds of thousands of shareholders owning over 218 million

shares that are not involved directly in the Government proposal, but who will be very badly hurt, in my judgment, by the proposal if it is put into effect.

As an illustration, our firm has on its books in our name in behalf of our customers some 2,600,000 shares of General Motors among 25,000 individuals. Many of these individuals are rather small people. We do not like to see them hurt.

The honest and frank thing to do if the Government proposal is put into effect is as soon as the knowledge becomes widely known, or known to us, to give these holders the benefit of our knowledge of the plan and of its effects, to give them all the facts and let them make up their own mind what they want to do.

Now, obviously, from what I have said before, if the customer then asks us what he should do, we are going to have to tell him, I believe, that he probably should dispose of his stock unless he feels he could go through a prolonged period of adverse price action without any qualms that it would not hurt him too badly financially, and/or, he could afford to wait it out. Now——

Q. Do you have——

A. (Continuing) I might add one other thing, Mr. Horsky. We are talking about 218 million shares here. If only one per cent of these stockholders, not in numbers, but in number of shares, decides to sell, we have another two [fols. 2320-2321] million shares. If two per cent, four million shares.

I do not know what the effects of such selling would be, but add it to the sales on the block basis, and the disorganized sales from the holders who get the distributions, the impact would probably be far greater than any figures that I could calculate.

Mr. Horsky: Is this a convenient time to stop, your Honor?

The Court: Yes.

(Whereupon an adjournment was taken in the trial of the above-captioned cause to Thursday, March 26, 1959, at 10:00 o'clock, a.m.)

[fol. 2322]

Transcript of Proceedings of March 26, 1959

The Clerk: Case on trial.

The Court: Counsel may proceed.

Mr. Horsky: Your Honor, I would like to make a request before we begin. Mr. Lenz is from New York and we have a witness who follows him, Mr. Stout, who is also from New York. We would be very much obliged if your Honor would consent, if at all possible, to continue the hearing today until we finish with those two witnesses, who would like to return to their homes.

The Court: That is agreeable to the Court. We can go beyond four-thirty, if necessary.

Mr. Horsky: Thank you.

WINTHROP C. LENZ, called as a witness on behalf of defendant, E. I. du Pont de Nemours and Company, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

By Mr. Horsky:

Q. Mr. Lenz, at Page 2312 of the printed transcript yesterday, in reply to a question which I asked you with respect to the relevance of rights offerings to the problem we have in this case, you replied in part as follows:

> "The fact that the offerings are at a big discount price brings in a big outside interest. I believe Mr. Scanlon of the telephone company mentioned the fact that in the rights offering of the telephone stock, that [fol. 2323] half of the stock was taken up by outsiders other than the stockholders of the company itself."

Do you wish to make a correction in that answer?

A. I would like to correct that answer to one-quarter instead of one-half. The half pertained to the debenture offerings and not to the stock offering, so the correct figure should be one-quarter.

Q. Does that change in your figure, Mr. Lenz—does that change your conclusion of the relevance of rights offerings?

A. It does not.

Q. I should also like to ask you, Mr. Lenz, as a matter of preliminary information, is Merrill Lynch one of the firms which is connected with the new Ford offering?

A. We are one of the managers, yes, one of the seven managers.

Q. One of the seven managers?

A. Correct.

Q. I did not ask you yesterday, Mr. Lenz, whether you considered in forming your conclusion in this case the current offering of the Atlantic & Pacific Tea Company stock. Would you state the facts on that and tell us whether you have considered that in arriving at your judgment?

A. Yes, we have considered that offering. The offering has been made so we are free to talk about it. The stock was split on a 10 for 1 basis in the latter part of 1958, and upon listing on the New York Stock Exchange on December 15th it jumped approximately five points in price to a price of 59 on the new stock.

It has since declined fairly gradually, partly as a result of the knowledge that a big offering was impending, and at the date of filing on March 4th sold at 46 and a quarter, and the offering of 1,800,000 shares was made at forty-four and a half dollars a share.

[fol. 2324] Q. What portion, if any, of the decline do you attribute to the knowledge of the large impending offer, Mr. Lenz?

A. It is very difficult to estimate the exact degree, there being some other factors present, in that there was some decline in other chain store stocks during the period mentioned, but this decline was substantially greater than the case of most of the other stocks, so that I would say that a fair portion of the decline was due to the knowledge that a large offering was impending, which has since been made.

Q. Is it true in your experience that it is usually known in the financial community sometime before a registration statement is filed that there is going to be a large offering of that stock?

A. Quite frequently. That is one of the most difficult problems to cope with, estimating when the knowledge is first bruited about. In the case of the Great Atlantic &

Pacific Tea Company the company appointed the Guaranty Trust Company quite some months ago as transfer agent, which indicated to most people that they contemplated an offering.

That was followed by the stock split, which I think also was a further tipoff that such an offering was about to take place at some near future date.

This is a somewhat unusual case in that in most instances the knowledge of the impending transaction is limited to only a very short period prior to the offering, whereas, in this case, it was a matter of quite some months and no one knew the definite amount or when it would come, but they were pretty sure that such an offering was coming to market.

Q. Now, when the court closed yesterday, Mr. Lenz, we were discussing your apprehension, if I can call it so, that one of the effects of the Government's proposed judgment [fol. 2325] in this case would be sales by existing General Motors stockholders of their own stock.

Now, in that connection, does Merrill Lynch list in its Security and Industry Survey, which is the quarterly publication that you send to your customers, a list of stocks preferred for purchase?

A. It does.

Q. Now, is General Motors presently among those stocks?

A. General Motors is still included in that list as of the last dated survey, which I believe was March.

Q. Were the Government plan to be put into effect, Mr. Lenz, in your opinion, would General Motors remain on that list?

A. No. We would have to remove it as soon as we knew with any finality what action was being taken in this matter being heard in this court, whether or not the Government's plan will be put in effect or not in its present form.

If it were put in effect in its present form, I am certain that the issue would be immediately removed from the list.

Q. In your opinion, would that be of consequence to your customers?

A. Decidedly so. It would do two things, primarily, Mr. Horsky: it would remove the interest on the demand side from prospective purchasers and, on the other hand, it would encourage the sale of stock by existing holders.

I might say that this would not be done, however, without a complete memorandum following such removal or at the same time, explaining the reason and giving in detail the findings that we have made in connection with this plan, so that the holder would be aware of the factors and the negative impact, which we could foresee for the market for the stock.

[fol. 2326] Q. That would go out to approximately 425,000 people, is that correct?

A. That is correct, Mr. Horsky, yes.

Q. In reaching your conclusion as to the probable market effect on General Motors stock of the adoption and execution of the Government's plan, Mr. Lenz, did you take into account the economic and financial characteristics of General Motors itself, as a corporation?

A. Yes, I did.

Q. Do you regard General Motors as being in a cyclical industry?

A. I regard the automobile industry as a definitely cyclical industry, as demonstrated by the fact that there are violent variations and fluctuations, rises and falls in automobile production.

For example, production of the industry rose from 5,559,000 cars in 1954 to 7,920,000 in 1955, and has subsequently declined to an estimated 4,250,000 cars in 1958.

Incidentally, that year 1958 is the worst year from a production and a sales standpoint since 1947-48.

Q. Would you state, Mr. Lenz, the relevance in reaching your conclusion of the cyclical nature of General Motors and the industry of which it is a part?

A. The importance, as far as this case is concerned, is the fact that over the course of a business cycle you have violent swings in sales and profits, and consequently in the prices of the stock.

If you go back to the year 1957, you will find that the stock declined from around $47½ to slightly over $33 a share, in anticipation of the very substantial decline which took place in earnings, both in 1957 and a still larger decline in 1958.

Now during the course of the 10-year period when the trustee will be forced to make sales of approximately two [fol. 2327] million shares a year, we can anticipate some of these periods of decline in profits and in the prices of the

stock. In making a large secondary offering, it is essential to have a fairly good market during the time of the offering and for a considerable period of time after the offering to assure a price after the offering equal to the offering price.

In other words, you could anticipate, unless there is a fairly sizeable period after the offering of good business and good profits for the automobile companies, and General Motors in particular, that the stock will be selling considerably below the offering price. That has been demonstrated, I might say, in all of these larger issues which have been mentioned in these hearings, even the issues that were initially successful, to wit: the Ford Motor Company offering on January 17, 1956, and the Upjohn offering late in 1958.

Q. In your judgment, what effect would the Government's proposed plan have on the ability of General Motors to engage in equity financing of its own during the period?

A. Well, I wouldn't say that it would be impossible for General Motors to undertake equity financing during this period, but it would make such financing highly uneconomic and very difficult of accomplishment.

We are assuming that there has been as a result of the trustee's sales an adverse impact on the market. Now on top of that, a big offering will be sold by the company on rights, which will necessitate a large discount; so we have a discount, as I see it, on top of another discount, and the price that the company would receive, based on the earnings and dividends would seem to be out of line with a fair and equitable price.

[fol. 2328] Over and above that, I would anticipate that the 23 per cent of the stock owned by du Pont and Christiana would be not allowed to subscribe, so that there would be the necessity of laying off not only the stock which couldn't be bought by other shareholders, but a very substantial block in addition to that amount.

Q. Let me ask you this: If Merrill Lynch at the time of such a rights offering by General Motors was not recommending the purchase of General Motors stock, would you feel that Merrill Lynch could participate in a rights offering?

A. If at the time the offering took place we were recommending sale of the stock or had a negative attitude on it,

we would be forced, unfortunately, to decline an underwriting position, in the group that would market it.

Q. Now it has been suggested, Mr. Lenz, at earlier points in this proceeding that this difficulty——

A. I might like to add one thing to that, Mr. Horsky.

Q. Please do.

A. Even if we wanted to go into an underwriting group at that time, at the time of a rights offering by the company, unless our Research Division changed their opinion and recommendation, a great many of our customers would fail to make any purchases or fail to exercise their rights; so that you could see there would be a negative effect even under those circumstances.

Q. Yes.

A. But without question or doubt, if we had a negative opinion, we definitely would not go into the business.

Q. Now it has been suggested, as I was saying, Mr. Lenz, earlier in this proceeding, that that impediment could be avoided if the plan of the Government were to be [fol. 2329] amended to provide for a suspension of the divestiture and the selling during whatever period was necessary to accomplish General Motors' own equity financing. In your opinion, would that be considered an advantage, were the plan to be so amended?

A. It might have some slightly favorable connotation. But I would assume that the trustee, being a sensible individual, and the company officials being the same, they would get together in the event that General Motors decided to do any equity financing and be certain to space the offerings properly, so that there would not be a congestion of stock coming on the market too rapidly, one offering right after the other.

Q. You assumed that in your previous answer?

A. I assumed that in my previous answer, yes, sir.

Q. To what extent, Mr. Lenz, in coming to your conclusion, did you take into account the reports of possible actions by the Government against General Motors?

A. I didn't take into account, in any manner, shape, or form, the investigation in connection with undue concentration, nor any possible pending legislation with respect to the divestiture of GMAC from the General Motors Corporation.

Q. Now on the basis of all this, will you state your opin-

ion as to the amount of the decline in the market price of General Motors which would take place, in your opinion, were the judgment proposed by the Government to be put into effect, as opposed to the situation where there was no such judgment?

A. If the judgment proposed by the Government were put into effect, it is my opinion that General Motors stock would sell 20 to 30 per cent below where it would have sold were this judgment not enforced.

I don't mean to say, Mr. Horsky—I want to explain this—I don't necessarily mean a decline; I mean the stock would sell 20 to 30 per cent below where it would have sold; in [fol. 2330] other words, if we are in a strong market and the market went up 20 to 30 per cent, General Motors would not necessarily go off, but it wouldn't go up, in my judgment.

Q. Let me ask you to change the assumptions that I have been putting to you, Mr. Lenz, heretofore, and assume, if you will, that the Government plan were to be amended to make it a twenty-year plan rather than a ten-year plan. Do you understand that assumption?

A. Yes, I do.

Q. On that assumption, and assuming everything else unchanged, what effect, in your judgment, would that have on the price of General Motors stock?

A. I would like to make one amendment, Mr. Horsky, to my previous answer to your previous question.

Q. Surely.

A. That is, that the 20 to 30 per cent adverse impact which I foresee to the market for General Motors stock does not take into account to any substantial degree the additional selling which I feel will take place from the holders of the existing 218 million shares, roughly, who are not affected by the plan except insofar as the price decline loses money for them on their existing holdings.

Now, you ask me about the extension of the plan to a twenty-year period.

I would think that the impact would necessarily be moderated, and I would judge, and I have come to the conclusion and it is my opinion, that the impact in this case would be from 15 to 20 per cent.

There will be offerings of only one million shares per annum, unless some of them are postponed, instead of two

million shares. In other words, based on the current market, $45 million a year instead of $90 million.

There will be some diminution in the sales from the [fol. 2331] holders of the anticipated one million plus who receive their shares from the distribution. However, I don't think that the decline in the number of holders who will sell, the distributees, if that is the proper word, will be quite as great as the difference between the 10 and 20 years would indicate. In other words, it would not be cut in half, because many of these people that receive the stock, the small people will need money, they find, to pay their tax, and the amounts will be small, and consequently they will still sell even though they are getting only half as much and the tax impact might be less.

Q. Let me change the assumption again, Mr. Lenz, and assume that it is a ten-year plan but assume that instead of paying out the General Motors dividend on top of its existing cash dividend, du Pont pays out the General Motors stock in lieu of its regular cash dividend.

To what extent would that change your answer?

A. The distribution of General Motors stock as the only dividend on du Pont, in my opinion, would cause a far greater impact on the General Motors stock than the overall plan which we forecast as 20 to 30 per cent.

I would say that it would cause additional sales, and that the impact would be between 25 and 35 per cent.

I might explain that the average stockholder and prospective shareholder does not as a general rule like stock dividends.

There is another factor here, and that is that the dividend starts and they are paying out General Motors equivalent, I assume, to, roughly, the $6.00 which du Pont is now paying in cash. However, if that paper or that scrip or that stock is reduced in price after the distribution, you are then in effect getting a lesser dividend, and as the impact [fol. 2332] takes place, therefore, that can be a detrimental effect on both General Motors and du Pont to that extent.

Q. Suppose we assume the intermediate position. We would have to change the plan to something more than ten years on this assumption, but suppose that du Pont is permitted to take out long enough so that it could pay out 50 per cent of General Motors stock and 50 per cent cash.

A. I would like to add one thing, Mr. Horsky, to that previous answer.

The all stock dividend comes to a number of holders, including a lot of little holders, and they need cash and they don't have any. That obviously is going to force a lot of them to make sales.

Also, no matter how it is looked upon, most people will consider it as a dividend and will sell, even though they could otherwise hold it. So that there will be a tremendous number of shares that will be offered for sale, and I use that term advisedly because sometimes you can have stock offered for sale and be unable to sell it at the price you would like to sell it at.

Now, you have asked in the next question as to the part cash, part stock.

I would say that there would be something in between the 20 to 30 per cent which I forecast on the over-all Government plan as now proposed, and the 20-year plan, which I forecast at 25 to 35 per cent.

Q. All right. Let's turn now, Mr. Lenz, to——.

A. Just where it would be between, I can't answer that, but in this instance, the recipient does have some money to buy the groceries with and to pay the taxes with, and there-
[fol. 2333] fore he may not be quite as hard pressed to sell the stock part of the dividend.

Q. Let me turn to the problem of the du Pont stock. Your study included, I think you said, a study of the effect of the proposed Government plan on the price of du Pont as well as General Motors, did it not?

A. Yes, sir.

Q. Did your study, Mr. Lenz, lead you to believe that any of the present holders of du Pont stock might offer it for sale?

A. Yes, it did.

Q. To what extent?

A. Well, I have once again gone over very carefully all the various tax figures prepared in the National Analysts' study, and it is obvious in computing certain tax figures that holders of du Pont in the higher brackets will benefit themselves substantially by selling and paying a capital gains tax rather than paying the income tax at the high rates year by year for a 10-year period.

I might add there are counterbalancing factors and I took those into account. I realize that the holder will weigh in his own mind the fact that if he sells the du Pont, he pays his tax immediately; whereas, in the case of receipt of the General Motors, he will pay the current income tax at the high rate year by year for a 10-year period. So he may feel that something will be done during that period, tax relief of some sort, such as the Frear bill, which may relieve him of some of those problems.

There has been mentioned here formation of personal holding companies. I suppose there is a possibility of doing that in certain instances. I wouldn't think it could be done in too many cases. There will be a lot of red tape, and it is going to be hard for people to move fast enough to take the proper action to set up such a corporation, but I assume probably some people would do that.

Now, I have also taken into account as well as I could [fol. 2334] the fact that there is a tremendous amount of inertia among all shareholders that own a wonderful blue chip company such as du Pont Company, which has treated them well for many, many years, and a number of them, perhaps to their grief, will continue to hold even though it is to their own detriment, and they might suffer quite substantially financially as a result. But I believe that there will be a number of them that will just do nothing.

However, on the basis of our computation, we believe that there will be the sale of perhaps five million to six million shares of du Pont as a result of this final Government decree, if it takes its present form.

However, to allow for a wide margin of error, and, if you assume that those figures were still cut in half, and we even said only two and a half to three million shares, the figures are so substantial and so large in relation to the market volume that has taken place in du Pont in recent years that it would be a real problem to dispose of such shares.

Q. You said, or I think you used the words, "would be sold." Did you mean sold or offered for sale in that case?

A. I meant in that case also, Mr. Horsky, offered for sale.

Q. Did you take into account——

A. I would say that as a matter of general market practice, the average stockholder would not follow a decline

in the market down too far. He just would wait and hope to sell on some price recovery.

That is why that there is some area in here in degree below which the stocks may not go.

Now, I haven't been able to forecast exactly, and nobody can either, where this area might be. I think we can only do it on the basis of our best business judgment.

[fol. 2335] Q. Did you consider, Mr. Lenz, in arriving at your figures any sales or potential offers for sale by trustees?

A. Yes, I did, and I believe that undoubtedly there will be some such sales.

I understand the tax problem which they are faced with, and the legal entanglements in this matter, and have been given some judgments in that respect.

There, again, I might say that it has been my experience over a period of time that many trustees unfortunately tend to wait and hope that relief is coming and may get caught as a result.

Q. Did you consider the possibility in this connection, Mr. Lenz, of existing du Pont stockholders taking the same course of action as you mentioned with respect to existing General Motors stockholders?

A. Yes, I did, and there again, I think in my answer we have given weight to that in the figure I have already given, Mr. Horsky; that is not an additional factor, as I see it.

Q. Is du Pont in the list of stocks preferred for investment in your present publication?

A. It is not.

Q. Now, in taking all of these factors into consideration, what would be the effects in your judgment of the execution of the Government plan on the market price of du Pont stock as contrasted with what it would be were there no such plan in execution?

A. I believe that the adverse market impact in this case could be measured at around 25 to 30 per cent.

Q. How long do you think that would continue, Mr. Lenz?

A. I would hate to venture an opinion in that respect. I think that I can foresee such an adverse market impact for the early years, but I do not think any of us can render

a complete judgment for a whole ten-year period. I would [fol. 2336] think there would be an alleviation of the effect as time went on for various reasons, because, Number 1, a new buyer would only have to pay a tax for a lesser period of time, et cetera.

Q. Now, let me run through with you the same modifications in the basic assumptions as I did with respect to General Motors. First, suppose the plan were a twenty-year plan. What would be your judgment as to the effects——

A. I want to go back just one second to that previous question. When I started the adverse impact as 25 to 30 per cent, that was done primarily with the view to the question that I mentioned before, that more stock might be offered for sale than could be sold at reasonable prices and that those—some of those potential sellers would withdraw their orders.

I do not think that du Pont is going to be given away as a result of these sales, as it could be if all of them sought to enforce sales within a very short period of time.

Q. May I just——

A. (Continuing) However, there is another factor that is adverse in this respect, and that is that the individuals who would be unable to give the stock away or to sell it might then be in a very difficult position. They would be caught between two fires. It is quite a tough dilemma.

Q. In that same connection, may I ask you this: Did you consider in reaching your conclusion who would be the buyers of du Pont during the period?

A. That, in my judgment, is the most difficult problem that we have, or one of the most difficult problems we have in this Government proposal.

I cannot foresee any financial firm, broker, investment [fol. 2337] banker, bank, trust company or investment counselor recommending purchase of du Pont where the man that made the purchase would be immediately buying himself into a very, very difficult and arduous tax problem.

With a reduction in the normal buying demand and a great increase in the supply of stock to be offered for sale, you can see that there might be quite a chaotic market resulting from these two forces.

Q. All right. Now, I think we were coming to the ques-

tion of the 20-year plan as opposed to the 10-year plan. Would that modify your answer?

A. Yes, it would modify my answer quite substantially. In this instance I would forecast the impact, the adverse impact as 15 to 20 per cent. The tax problem becomes much easier. In all probability people may not go up so many steps into higher brackets and the longer period may increase their confidence that relief will be coming in the form of some tax legislation during that period.

Q. Tell me, who do you think is going to buy the du Pont stock that is offered for sale, Mr. Lenz?

A. Well, I assume that there are a number of tax-free institutions and corporations that would have only a very small tax, and others of that nature, who, at bargain levels, would definitely be buyers and in some cases, perhaps, buy in excess of their normal quantities of stock or, even if they had normal quantities now, make an exception because there would be such a bargain as far as the price is concerned.

There might even be a few rare individuals who would be induced to make purchases as a result of a much lower price. Perhaps some people with unusual tax problems [fol. 2338] of their own where they might have some benefits if they had current tax losses to match against the current tax gains, and yet they could use the resultant tax loss on the du Pont stock, the long-term capital loss, that would be an instance; but I think that would be a very negligible number of people.

Q. All right; one other question. How would your answer change were the plan now to remain at 10 years but were du Pont to pay out General Motors stock in lieu of its regular dividend? What would be the effect on du Pont, I mean, on the du Pont stock, of course?

A. This is the entire distribution of the 43 million shares at one time?

Q. No, no. I am asking you to assume a 10-year plan, but General Motors to be paid out by du Pont in lieu of its regular cash dividend. The same assumption that I asked you to make with respect to General Motors.

A. The effect on du Pont?

Q. What would be the effect now on the du Pont stock?

A. By the payment of that dividend?

Q. Yes.

A. I cannot measure that effect, Mr. Horsky. I know it would be an adverse effect in that it would, I am sure, reduce the number of people interested in buying du Pont. Investors do not like to buy stocks paying only stock dividends.

The reduction in the buyers alone distorts the market. How many people would sell as a result of a stock dividend being paid, sell their du Pont, I cannot accurately judge.

I could say that it would be a substantial number. I cannot make any accurate mathematical computation in that respect.

[fol. 2339] Q. Would your answer be the same if I were to ask you on the assumption of a 50 per cent cash, 50 per cent stock dividend?

A. Well, I want to add one thing to the previous statement, and that is that I think undoubtedly the payments of the stock dividend in General Motors in lieu of the regular $6 cash would cause some selling from people who would not like to see the dividend that they were receiving in kind reduced in price as a result of the adverse action on General Motors. Now, that, I think, might come to a fairly sizeable figure.

Q. Now, suppose, Mr. Lenz, it is 50 per cent General Motors stock and 50 per cent cash which du Pont is using as its dividend; can you give an estimate as to what the effect on the du Pont stock would be under those circumstances?

A. No, I can't but, obviously, it would be alleviated from the previous instance we discussed of all stock.

Q. Now one last assumption, Mr. Lenz. Suppose that the order of the Court were to be that the total amount of the 43 million shares was to be distributed in one piece, in one year, right away, with the 20 million shares to be retained by the trustee to be sold over the 10-year period, or at such time as you could sell it? What would be the consequences of such a plan on General Motors and du Pont?

A. I think the effect would be much worse than on any of our previous assumptions, in that the tax would be tremendously increased. Many people would go up and jump up many brackets in tax, because it is my understand-

ing that roughly $28 would be fully taxable under these circumstances, with the additional $17, a reduction in the valuation that you carry your du Pont stock at. So many people would be jumped up so many brackets that I would [fol. 2340] think there would be a great increase in the amount of stock for sale.

Q. A great increase in the effect on General Motors?

A. On General Motors.

Mr. Horsky: I have no further questions.

Mr. Bushby: I would like to ask the witness a few questions on behalf of Christiana and Delaware, if the Court please.

The Court: Proceed.

Direct Examination.

By Mr. Bushby:

Q. Mr. Lenz, in your opinion, could the trustee, under the Government plan, sell two million shares of General Motors in the auction market on the floor of the New York Stock Exchange without disrupting the market?

A. It is my opinion that he could not.

Q. What, in your opinion, would happen if a broker with a trustee's order to sell two million shares went down to the floor of the Exchange with that order? What would the specialist do?

A. Well, the sale would be known, and as a result of persistent selling on the floor, I think the specialist would undoubtedly, under such circumstances, call in one of the members of the Board of Governors, and ask for some action to be taken to relieve the distressed conditions in the market.

I would assume that the Board of Governors would recommend that the block be disposed of through proper channels.

Q. What would you consider proper channels?

A. A secondary distribution.

[fol. 2341] I might add that all knowledgeable people in the financial business, if they have a block of General Motors of anywhere near this size, would dispose of it and handle it only through a secondary distribution.

Now there are some rough yardsticks as to what a secondary distribution should be in the point of size.

Q. Let me ask this, just to make the record clear. The secondary distribution does not constitute selling on the New York Stock Exchange, does it?

A. No. It is an offering made generally after the close of the market of a large block, with the permission of the Stock Exchange. You have to get permission from the Exchange itself first.

Q. If you are a member?

A. If you are a member.

Q. And if it is a listed stock?

A. If it is a listed stock, that is correct.

Now, any knowledgeable firm in the financial business, in the financial field, getting a block of General Motors, beginning with somewhere around 100,000, 150,000, or 200,000 shares, would immediately go to the Stock Exchange and ask permission to handle such a block as a secondary distribution.

The Exchange has jurisdiction as to whether or not to give permission on such a block. And there is no exact yardstick; it is a matter of their own judgment when they check the market and check the specialist, and the activity in the stock, as to how much there has to be under those conditions on that day to warrant a secondary and to give approval.

Q. Well, you are talking about 150,000 or 200,000 shares?

A. That is correct.

Q. You are not talking about two million shares?

A. That is correct.

[fol. 2342] Q. Isn't it perfectly clear that it could only be a secondary?

A. That is correct.

Q. Would non-members of the Exchange participate in such an underwriting?

A. Non-members of the Exchange would participate. That is the advantage, of course, in addition to the secondary form of distribution, in that if you look over the list of the largest underwriting firms, you will find roughly half are corporations that are non-members, where the others are either partnerships or corporations which are members; so you gain the distribution system of these non-

members in the secondary distribution, which you do not have on the New York Stock Exchange in the regular sale of a large block.

Q. Well, now, isn't there also a difference in the commission or concession situation of a secondary, as against an offering on the floor of the Stock Exchange?

A. There is a much larger commission paid on a secondary distribution, and consequently, a much greater sales effort, and it can be made of a more extensive nature to effect the sale properly.

Q. What do you think that spread or concession would have to be in an offering by the trustee of two million shares, secondary offering?

A. Well, I have made a rough calculation, and there again it would depend upon the circumstances at that time. But based on current thinking, I would say that the concession would have to be, with the stock of General Motors around 45, the current market, about $1.80 to $2 per share.

Q. Well, now, the people for whom the trustee is selling, that is Christiana and Delaware, would lose not only the reduction in market price which you have testified to, but also the spread, wouldn't they?

A. That is correct.

[fol. 2343] Q. I would like to have you comment on the difficulties of such a secondary offering, if the offering had to be registered with the Securities and Exchange Commission, under the Securities Act of 1933.

A. I don't think there would be in this case too much difference between whether it would have to be registered or whether it would not, in that it will be known that the two million shares is for sale, and the only disadvantage I could see is that you have a period from the registration date, the date of the filing, of 21 days, and you might be worried about the market at that time—what might happen during the twenty-one day period.

I don't think there is too great a difference in this particular case. Ordinarily, the secondary that we would be talking about, if it were not registered, could be brought out on 24 hours notice, if it were not too large a block, and we could move it right away. And there we would be able to do it, probably, at a better price, as a result, because the impact would not be as great. There wouldn't be time enough

to have the same degree of impact as there would during a twenty-one day waiting period.

Q. But if you have the twenty-one day waiting period, with a registered secondary, then something happens—you have to withdraw it, and that is a very bad black eye, isn't it?

A. Yes, with that stale or warmed over business it is very difficult to revive buyer interest and demand to the degree that you had it initially. It does have an adverse effect.

Q. Mr. Lenz, I would like to have you make one other assumption. I would like to have you assume that legislation such as the Frear Bill passes, which would make a distribution of the General Motors stock pursuant to a [fol. 2344] court decree by the du Pont Company tax free. And assume a distribution of the whole 63 million shares takes place in one year, but also assume that the Government still insists that a trustee be appointed and that the shares distributable to Christiana and Delaware and the stockholders of Delaware, and also the shares owned by Christiana, be sold in ten approximately equal annual installments.

What do you think the effect on the market price of General Motors stock would be under those assumptions?

A. In other words, you are asking me, Mr. Bushby, what the effect would be of these annual sales of two million shares if the distribution were made on a tax-free basis?

Q. In one distribution?

A. In one distribution.

Q. Because I n assuming that the corporation wouldn't wait to see whether the Frear Bill would be repealed.

A. I think there would be an adverse impact to the extent of, roughly, 10 to 15 per cent, based on studies of other secondary offerings, and in particular the Sloan Foundation distribution of 1,300,000 shares, where the impact was roughly close to five per cent.

Now it might be possible that there would be a little higher percentage resulting from some sales, from the people who are getting General Motors, who don't want General Motors, or who have too much General Motors now. That might add a little bit, but I wouldn't be able to esti-

mate how much. I haven't any facts on which to base such an opinion.

Q. Now, Mr. Lenz, are you familiar with the provision of the Government proposed decree, which reads this way:

"If in the judgment of the trustee, reasonable market conditions do not prevail over an appreciable and ade-
[fol 2345] quate portion of this one year period, the trustee may petition the court for an order extending this time for such additional part of the ten-year period as the court may direct. In addition to such other circumstances as may be relevant, reasonable market conditions shall not be deemed to exist if the price which can be realized at the time by the trustee is not sufficiently high to reflect the fair value and true worth of the stock."

Are you familiar with that?

A. Yes, I am.

Q. In your opinion, at any time during this 10-year period, can the trustee realize a price which reflects the fair value and true worth of the General Motors stock?

A. Well, I think that would be up to the trustee to make his own judgment in that respect.

Q. I am asking for your judgment? Do you think he can?

A. My judgment would be that he could not, but I might say that he might consider that if we are in a very strong market and General Motors was selling at a higher level than the initial distribution that he was getting such a fair and equitable price——

Q. Would that be true?

A. I wouldn't think that would be so.

Q. It wouldn't be true?

A. It would not be true. That is correct, sir.

Direct examination.

By Mr. Dallstream:

Q. Mr. Lenz, the impact upon the market in the case of these large secondaries, registered secondaries, begins not on the day of the sale or necessarily on the date the regis-
[fol. 2346] tration statement is filed, but it begins when the public gets word of the situation, does it not?

A. That is right, Mr. Dallstream. That is correct, sir.

Q. You can't have a registered secondary, a large one, with the registration statement to be filed, the work of the accountants to be done, the conferences with the lawyers, conferences with the underwriters, and all, without having it bruited around pretty much for the six weeks before the registration statement is filed, is that not true?

A. That is quite often so. I am reminded of the fact that J. P. Morgan, Sr., had a conference with two individuals one day, and he said, "Now, you are here," and he marked down one, and I am here, and Mr. Dallstream here. That is 111 people, so this secret will be out in about five minutes.

Mr. Dallstream: Thank you very much.

Mr. Bushby: I should like to have marked for identification as Christiana Exhibit No. 13, a tabulation headed, "Value of Shares Sold Through Special Offerings, Exchange Distributions and Secondary Distributions 1951 to 1957."

(Thereupon said document was marked Defendant Christiana Exhibit 13, for identification.)

Mr. Bushby: I would like to offer the exhibit in evidence, and state for the record that it relates only to secondaries in securities listed at the time on the New York Stock Exchange and does not include a secondary such as the first Ford offering when it was not listed on the Exchange.

I understand the Government——

Mr. Reycraft: No objection.

The Court: It is received.

[fol. 2347] (Said document, so offered and received in evidence, was marked Defendant Christiana Exhibit 13.)

Cross-examination.

By Mr. Reycraft:

Q. Mr. Lenz, when did you begin your study in connection with your testimony in this case?

A. We began our studies only a relatively short while ago because we wanted to wait, Mr. Reycraft, until all of the information was in its final form.

For example, we had begun preliminary studies at an

earlier time, but the tax studies, for example, prepared by the National Analysts were not in final form or received by us until about January 20th or January 21st.

Q. Did you receive those estimates in their previous form before——

A. Yes, we did, but we didn't spend too much time with the preliminaries because we thought there might be a lot of revisions and the work would all be thrown out the window, and unfortunately we have a lot of other work to do in our organization.

Q. You preferred to rely on the final tabulations as they were completed and as they were offered in evidence?

A. That is correct, sir, I did.

Q. Who in your firm, Mr. Lenz, did this study?

A. My associate, Mr. John Seder, who is in our Buying Department, was the man that did most of the work, and he had several of the other men in our Buying Department working with him, but he headed up the work on the study.

Now, I might say, Mr. Reycraft, to amplify that, naturally we have been assisted in certain basic data and infor-[fol. 2348] mation by our research specialists who handle both General Motors and du Pont.

Q. Did Mr. Seder submit a memorandum to you in connection with his study?

A. No, he did not.

Q. He reported to you orally then, I take it?

A. Yes. We worked all the matters out together orally.

Q. When did he make his report to you?

A. I couldn't tell you what date. We went into various phases as we went along, but as to final determination—I might say this, that we came to the decision that it would be an adverse impact, naturally, a long time before we came to any decision or any judgments as to the amounts of the impact and the various assumptions, using the plan as now constituted, revision for the 20 years, and so forth.

Q. When did you come to that conclusion, sir?

A. I would say probably about the latter part of February or early in March.

Q. But at that time you hadn't made any quantitative estimate?

A. That is correct, sir.

Q. When did you make your quantitative estimate?

A. In the early part of March.

Q. You had reached the general conclusion in January or February, is that correct, and then you——

A. I would say in the latter part of February.

Q. And then you reached your quantitative conclusions in March?

A. That is correct.

Q. This month?

A. That is correct.

Q. Let me ask you, sir, did Mr. Seder or did any of the other members of your firm prepare any charts or graphs or tabulations which they submitted to you in connection with your study?

A. No, only the—we had looked at some things to see if we thought any of them were pertinent, Mr. Reycraft, and [fol. 2349] we didn't find any that were, so the only one was the one that was given in an exhibit on the Aluminium.

Q. That is the only information which you considered pertinent in making your study?

A. No, the only chart we considered pertinent in this matter.

Q. But you did study a considerable amount of other material?

A. That is correct, sir.

Q. Now, I get the impression from your testimony that you feel that the supply and demand situation is a basic factor here, would that be corerct?

A. Yes, that is primarily correct, Mr. Reycraft—no, I wouldn't say that is the primary factor. I think the tax matter is all important.

I think all these things lead to changes in the supply and demand and the forcing of the sale is the thing that is the vital element.

Q. Would it be correct to say that, in your judgment, the tax considerations are relevant because they affect the supply?

A. Yes, sir, I think that is correct.

Q. So that basically we do get to a supply and demand situation, do we not?

A. Probably so. Probably so. Yes, I think in the final analysis that is correct, but it is also not only the supply and demand, but the fact that the supply has to be sold, a

lot of it, both because of the trustee sales and also because of the tax compulsion.

I mean, the supply that is being actively motivated in the sale is a lot different than the supply that is merely there and not active.

Q. In what respect is it different?

A. It draws the market down.

[fol. 2350] Q. How does it do that?

A. Through the forced sales or through more selling.

Q. Through increase in supply?

A. I don't know whether you would call it increase in supply or not. I guess maybe you would call it increase in supply, yes.

Q. Can you think of anything else to call it?

A. I would call it volume of selling.

Q. You call it volume, rather than supply?

A. Volume of selling.

Q. And you think volume would be more appropriate?

A. No, I don't. Volume—when it is volume being sold, yes. I think there are two things we are talking about on volume, one is the number of shares traded, and the other is the volume of selling. I think there is a difference there, a great or decided difference.

Q. There is a difference between volume of trading and volume of selling?

A. Definitely.

Q. What is trading?

A. Trading is market activity in a security.

Q. Is it buying and selling activity?

A. Buying and selling activity. But when we are talking about volume of selling, we are not talking about volume on any one specific day. We are talking about what it does over a course of time.

Volume is only a figure by which you measure the activity from day to day, and it doesn't have anything to do with the amount of stock for sale—supply—or the amount that will be sold.

Q. So that we are talking about supply and demand, are we not?

A. I assume probably we are, Mr. Reycraft.

Q. You stated, I believe, that you have studied a good many secondary issues?

A. Yes, sir.

[fol. 2351] Q. Including the Sloan secondary?

A. That is correct.

Q. I believe you testified in connection with the Sloan secondary that, according to your estimate, there was a five per cent depressing effect?

A. A little less than five per cent, I think I said, Mr. Reycraft.

Q. Did your study indicate to you how long that effect lasted?

A. No, I didn't measure the lasting effect on the stock, frankly.

Q. Do you think it continues?

A. No, I do not think it continues.

Q. How long do you think it took before that depressing effect was dissipated?

A. I think it took a relatively short period of time, and I must confess I don't have in mind the exact trend of the price but the auto business was pretty good in 1956, in the spring, and that can absorb the impact pretty rapidly.

But you still have to measure your impact against what it would have been. That is the hard judgment that we are trying to make here in this case.

Q. That is true.

Now, you did use the five per cent figure though?

A. Yes.

Q. And I am curious to know, you used some figures to get to that percentage, and I am interested in knowing what figures you used.

A. I used the $46 price, the day before the announcement, as against the offering price of $43¾.

Q. You took it from the day of the announcement to the offering date?

A. The day prior, the close of the day prior to the announcement.

Q. And to the offering date?

A. That is correct.

[fol. 2352] Q. Did you examine the price movement of the issue after that date?

A. No, I did not. Rather, I shouldn't say that I didn't but I can't remember what it was.

We looked at all these secondaries, both before and after,

but we only took the parts out that we thought pertinent to the problem at hand, so I cannot remember what the price action was subsequent to that time.

Q. And you think those are the only two pertinent points?

A. No, I don't think those are the only two pertinent points. I think that those, in this particular instance, are the pertinent points.

Q. In this particular instance, those are the two pertinent points, is that your testimony?

A. That is correct. That is correct.

Q. Would it be accurate to say that the 5 per cent you are talking about was the 5 per cent the seller had to pay in view of the volume of the secondary?

A. It is 5 per cent less than he got for the stock, yes.

Q. In other words, it is 5 percent less than the market was the day before the announcement?

A. That is correct, Mr. Reycraft.

Q. So it appears the seller may have paid 5 per cent?

A. In effect paid it, or he got less, whichever way you want to put it. Yes, that is correct.

Q. Now, with respect to the other stockholders of General Motors, what in your judgment would be the penalty, price or impact, or whatever you want to call it, upon them?

A. Well, just very temporarily they had, of course, naturally that 5 per cent impact or 5 per cent decline in the value of their aggregate holdings.

Q. Now, would you be able to give me a time period within which that 5 per cent impact lasted? I know you testified [fol. 2353] you don't have the specific figures, but do you have a recollection?

A. I don't know the specific price trend after that, so I can't tell you what the duration of the impact was, Mr. Reycraft.

Let me say this: that if a secondary of this nature is well handled and properly handled, and there are not any existing blocks that we know of overhanging the market which may come into the market for sale, then the holders, the existing holders as well as other prospective purchasers, may believe that the impact in this case is going to be but a temporary impact because there are going to be no recurring sales of that nature or, at least, not in the reasonable future.

Q. Well, in your opinion it was a temporary impact?
A. Yes, it was.

Q. Does the period two weeks refresh your recollection with respect to the time you may have thought significant when you examined these figures?

A. No. I recall there was some exhibit which, frankly, as I remember it—yes, I think I do have it.

Q. You may look at it.

A. Yes, I think that there was a little different figure used there as a result of that study, as I remember, three per cent, or some figure such as that. I think I have it here.

Mr. Horsky, do we have that exhibit that I can see? You are talking, Mr. Reycraft, about the industrial common stock offerings? That is the one, I guess, I am not sure which one it is.

Mr. Reycraft: Mr. Horsky, may I look at the exhibit, so we will know what you are talking about?

Mr. Horsky: Government Exhibit No. 98.

[fol. 2354] By Mr. Reycraft:

Q. And you also have the Morgan Stanley price series?
A. This I have not seen before, Mr. Reycraft.
Q. You have not seen that before?
A. No, I have not.

Q. If you have not seen it before, I do not suppose it would refresh your recollection as to the examination of that document, would it?

A. Not this one, no.

Q. Well, you may examine it.

A. The other one I have seen before. Let me just see here if I can read this, and then I will be all right. I do not have that other exhibit.

Q. Do you want to see this (indicating)?
A. Yes. Do you want that back?
Q. No, you look at it. It is 32.

A. May I ask Mr. Horsky if he can read this script that is on here? I can't read it.

Mr. Horsky: I will try.
The Witness: Right here. Is that it?
Mr. Horsky: That is the effective date of the offering.

By the Witness:

A. All right, Yes. I have it.

By Mr. Reycraft:

Q. Now, can you tell me, sir, referring to du Pont Exhibit No. 32—Let me ask you also, have you examined Mr. Emerson's testimony in this case?

A. I have read the testimony of most of the witnesses, including Mr. Emerson's testimony.

Q. The witnesses for both sides?

A. Yes.

[fol. 2355] Q. Now, Mr. Emerson, I believe, shows what he calls an impact of 3.5 per cent. In another place, he shows an impact of 2.9 per cent in the Sloan secondary, and you get five per cent; is that right?

A. Yes. I said slightly less than five per cent.

Q. Well, you would disagree then with Mr. Emerson with respect to the pertinent time?

A. Well, I think it is a matter of each person's and each firm's individual judgment as to exactly what the proper time period is, Mr. Reycraft.

Q. It is a matter of opinion as to—it is a matter of expert opinion as to what the appropriate time period is?

A. That is correct, and that is generally, I might say—it comes down to individual cases. I will say also this, that the cases you handle yourself, you should be usually in a better position to pick the proper periods.

Now, Mr. Dallstream mentioned the fact that these issues become known sometimes considerably before registration. For example, the proper period to pick is usually when the offering does become known for the first time. That varies considerably from time to time, and between different issues.

So it is almost as important to have exact knowledge of the offerings that you have done yourself to be absolutely on firm grounds. There is a matter of judgment, there is no question about it.

Q. Well, Mr. Emerson was associated with the managing firm, so I assume you would accept his judgment.

A. Not necessarily. In this case not.

Q. In this case you would not accept his judgment?

A. I would not.

[fol. 2356] Q. What is the number of the exhibit which contains the price movements?

A. I might say——

A. What is the exhibit number, please?

A. Oh, this exhibit (indicating)?

Q. Yes.

A. Government 98. I might say, Mr. Reycraft, that the reason that I made the statement I did with regard to the impact was that I find, regardless of other factors, you are tying down two known specific periods: The closing on the date before the announcement and the offering date.

Now, any other period, in most instances, to make an absolutely accurate comparison would be very difficult. You would have to have different dates for different issues and you would have to have that exact knowledge.

Q. Your method has the advantage of simplicity?

A. It has the advantage of better comparative figures. Now, it may have some degree of inexactitude as a result of these other factors, but it does show you from the date of the announcement, which is where the news is widely spread, to the date of offering, there is that impact.

Now, some people might have some knowledge of the offering ahead of time.

Q. Will you examine Government's Exhibit 98 and tell me when you think the five per cent impact was dissipated?

A. Well, I could not tell you just from the prices. You are talking about Government Exhibit 98, Mr. Reycraft?

Q. Yes, sir.

A. Well, I assume that the impact was over within a couple of days.

Q. You would assume it was over within a couple of days?

A. Yes.

Q. Mr. Lenz, let me ask you——

Mr. Horsky: Can I take those now?

Mr. Reycraft: Yes.

[fol. 2357] By Mr. Reycraft:

Q. Who is in charge of the Underwriting Division of Merrill Lynch?

A. George J. Leness, L-e-n-e-s-s.

Q. And I believe you testified that you are in charge of the Corporate Buying Department?

A. That is correct, Mr. Reycraft.

Q. How many departments are there in the underwriting division?

A. Well, we have the Corporate Buying Department, the Syndicate Department, and the Accounting and Legal Departments, and New Prospects Department.

Q. Now, which department does the retailing of the stock which Merrill Lynch sells?

A. The retail department of our sales division does the actual physical retailing, but I might explain in all large offerings, secondaries and otherwise, that the buying department members who have been working on the deal follow a deal right on through to its final consummation with the retail department when they get to the sales end of it.

Q. Would it be correct to say in a secondary distribution generally Merrill Lynch would have a certain degree of percentage of participation?

A. Yes, sir.

Q. It would also have a certain percentage allocated to them for retail distribution?

A. That is correct.

Q. And will you make sales or transfers to your Retail Division for sale of that part of your percentage participation in the underwriting?

A. We let the Retail Department of our Sales Division know that we have an underwriting position. Let us say in the case of the Sloan secondary—I do not know what amount it would have been, but——

[fol. 2358] Q. Fifty thousand?

A. Let us say 50,000 shares; we let them know we have 50,000 shares underwriting position. We then let them know that we have been allocated maybe the entire 50,000 underwriting position and maybe additional stock, and that they therefore would have, let us say, another 50,000 shares or 100,000 shares to work on.

Now, we keep tabs on how the sales are going.

We, in our department, write the sales memoranda, which are primarily the synopses of the registration statements, which then go out to all the offices and the salesmen, and the orders come back in through the Retail Department.

Q. Now, can you tell me how, physically and mechanically, your firm asks for orders? In other words, how do you go about getting from the allocation of a certain number of shares to selling the stock to the ultimate distributee, you might say, or public?

A. Yes. In other words, you want to trace the offering from the time that we make the announcement ourselves?

Q. Yes, briefly.

A. I will do it briefly.

We send out an announcement wire of the issue, that we intend to be an underwriter, and so on and so on. We don't show the amount of our underwriting position, naturally, to our salesmen. And we follow that up then with a memorandum.

As soon as the registration statement comes out in preliminary form, we make a memorandum up. The announcement wire is sometimes followed by a wire that gives a summary and then a longer, more comprehensive summary; and then, as the result of those memoranda, the offices give [fol. 2359] us indications of their interest, each office. Each manager, generally, or sales manager in each office has a meeting with his men, and they decide that the office probably can handle 10,000 shares of stock, let us say.

Q. Well, I don't like to interrupt you, but at this point may I ask you whether this indication of interest is an indication of interest from the manager and his salesmen? Presumably, they have made no contact with the——

A. That is correct, Mr. Reycraft. That is their own estimate as to what they think they can do. Each salesman looks over his own accounts, and he thinks he can get buyers from these people, but sometimes he can be quite wrong in that respect.

Q. Then what happens next?

A. Then when we go along a little further down the line, and by that time you have gotten some indication based on your past experience as to how much you think you are going to be able to sell. Sometimes you may be wrong in your judgment in that respect.

Then when we get to the end of the registration period, the price is announced, we flash out the price, and we get the orders sent in—actual orders at that point.

Q. You are not allowed to take orders until the registration is effective, is that correct?

A. That is correct.

Q. Now, let me ask you this with respect to the Sloan secondary. At the time the Sloan secondary was announced, was there any shortage of General Motors stock on the Exchange?

A. I don't think there has ever been any shortage of General Motors stock on the Exchange.

There is a balance. The price that it is selling for reflects the balance at that particular time, at that particular point.

[fol. 2360] Q. The balance of the supply and demand?

A. Anybody that I have ever known who has wanted to buy General Motors has always been able to buy it; maybe not at the price that he would like to buy it at; but that has always been true.

Q. But it has been available in unlimited quantities. Is that your recollection?

A. That is correct, yes, sir.

Q. So that in your judgment all of the demand which was existing for General Motors stock was being satisfied on the New York Stock Exchange prior to the Sloan secondary?

A. All of the demand except the demand by those people who wanted to buy it at a lower price.

Q. Now can you tell me how this new demand was found with respect to the Sloan secondary?

A. Yes, I think I can.

I testified earlier that a secondary distribution such as the trustees shares bears a much higher commission, spread, underwriting spread.

Q. What was the commission on the Sloan secondary?

A. I don't recall, Mr. Reycraft.

Q. Would it refresh your recollection if I told you that it would be between two and three times the normal stock commission?

A. That sounds about right. I don't remember the exact figure, but that does sound about right. And it is a mere matter of salesmanship. A lot of people that perhaps haven't contemplated buying General Motors or those that have some and haven't contemplated buying more are sold through the additional information made available and

through stressing the strength of the issue, which perhaps they are not familiar with. So additional demand is created. [fol. 2361] But that is created, incidentally, in this instance—I might say also that one of the reasons for the increased demand is the fact that it was 43¾ rather than 46.

Q. Yes. Now let me ask you, suppose that I had been interested in buying General Motors stock at that time, and after the announcement the price gradually went down in a period of 20 days on the registration and I could have bought it through the New York Stock Exchange at that price, could I not?

A. That is correct.

Q. Why would I buy it from you on the secondary distribution rather than through the Exchange? What inducement would there be?

A. The inducement is in this case that you could buy it at 43¾, whereas it had sold for 46 a short time earlier, but you didn't know whether or not there might be such an over-subscription that it might not again be selling at 46 right after the distribution, so you are taking your chances that you might not have gotten it at as favorable a price.

Q. Assume the registration statement has been filed, and there won't be any sale for 20 days, and on the 18th day I watch the price go down and go in and buy it at 43 or 44? What is the incentive to a prospective purchaser to wait for the secondary?

A. If you can buy it at a cheaper price net to you, there is no incentive, and there never is.

Q. Will you describe to me in what respects it is a cheaper price to buy it on the secondary?

Is that your testimony?

A. No. I said it would be undoubtedly to your advantage to buy it ahead of time, if you could buy it at a cheaper price.

Q. Why should anybody buy on a secondary?

[fol. 2362] A. But, when you bought it, if you bought it in that earlier period, you would have had a little foresight, because you didn't know what the price of the secondary was going to be; you might have bought it at a lot cheaper price on the secondary.

Q. So that the only chance I would be taking would be that the secondary would be priced below the market?

A. Yes. And in a secondary, a man that wants to buy a large block of stock can, in many cases, buy that block at that fixed price, which he might not be able to do at all on the floor of the New York Stock Exchange.

To buy 20,000 shares might run the price up a point or two points. We don't know how much.

Q. For the large buyers, there is a real inducement to buy it through a secondary, isn't that correct?

A. That is correct.

Q. You also testified that one of the inducements would be that the price on the secondary might be lower; and it might be to the buyer's advantage to wait.

A. That is correct.

Q. Do you know, sir, whether with respect to the Sloan secondary, that that issue was priced below the market?

A. It was priced, I assume, right in line with the market. As a matter of fact, if that chart is correct, it looked to me as though it was priced at 43¾, and the market closed at 43⅞ on that day—practically at the market, let us say.

Q. In your experience, sir, is it the conventional practice to price the secondary at the market on the day on which it is offered?

A. Generally, it is priced at the market, and it is generally priced at the last sale. If it is a very large block, sometimes there is a concession, and it is priced at a lesser price than the last sale price, but that generally would be [fol. 2363] a very minor differential, fractional, generally.

Q. Now then, so far as the Sloan secondary is concerned, if the buyer waited for the secondary to be priced below the market, he would have been disappointed, would he not?

A. Below the existing market on the day that the price was set, yes.

Q. Yes.

A. Yes, that is correct.

Q. So that that is not the type of inducement which a buyer can generally count on, is it?

A. No. You can't count on anything in the market, either in secondaries or any other thing. You just have to make your best guess as to whether you are getting the right price or whether you aren't; and whether you want to buy

it at 43¾, or any other price. But you can't predict one day ahead of the sale, nor can you predict prior to the sale, what the price is going to be.

Q. Well, now, with respect to the Sloan secondary, when the price was announced, it was virtually at the market. Will you agree with me on that?

A. That is correct.

Q. How then did your firm go about selling its part of the stock that was allocated to it?

A. Well, the salesmen—various salesmen called their various customers and got various customers to buy 50, 100, or whatever the case may be, shares of stock.

Q. Did they get them on the phone?

A. They get on the phone, that is correct, unless, as is often the case, when an issue of this type is in registration, the customer calls up and says, "I am going to have an interest," and he may have already indicated such, and sometimes may have indicated that he might have some limitation on the price.

[fol. 2064] Q. Have you finished your answer?

A. Yes, sir.

Q. What inducement is there to the salesman to get on the phone with respect to General Motors on the day of the announcement of the secondary, as compared with two or three days before?

A. He is getting commission—two or three times as much money.

Q. That is what he gets——

A. That is the primary inducement. But let me say this: that we don't and I don't think any other good firm goes into a secondary unless we believe the stock is a purchase for our customers at that time and at that price. So that we—and what it is is spot-selling, based on specific information, whereas two or three days before, the salesman may never have even thought of General Motors, or maybe the customer hadn't. But here he has got all this information and he has got something that he can actually sell.

Q. But he might never have thought of it before?

A. That is correct.

Q. Now from the point of view of the purchaser, you testified that the salesman makes two or three times the

normal stock exchange commission, and that would be on General Motors, $1.20; would that be about right?

A. About right, yes.

Q. What does the purchaser pay?

A. Actually, the salesman probably might not have gotten that much.

Well, that is pretty close—a dollar, maybe.

Q. He would perhaps have to give some over to the firm? What does the purchaser pay?

A. The purchaser pays the net price of 43¾.

[fol. 2365] Q. He pays the market price?

A. That is right.

Q. Does he pay—when he normally buys the General Motors stock, does he pay a commission?

A. He pays the commission, so he is getting it, less the commission. That is another inducement.

Q. So there is an inducement to the purchaser to the extent that he gets it less the 40-cent commission, is that correct?

A. That is correct, yes.

Q. So that basically——

A. That amount, of course, is really in effect paid by the seller.

Q. It is paid by the seller, because he has paid the salesman?

A. That is correct, yes.

Q. So that you and the other underwriters who participated in the Sloan secondary were able, for a total spread of $1.20, to generate demand for 1,300,000 shares of General Motors, is that correct?

A. That is correct, Mr. Reycraft.

Q. Overnight?

A. No, not overnight.

Let me say this—that our own particular case may not be indicative of everybody else's. We can create a demand ordinarily much quicker than anybody else can, because we have more customers and more wires to get out, and more people to work on it faster; but sometimes the interest can be built up very rapidly. There are other times when it takes a long struggle of the whole twenty-one day period to get the interest anywhere near the amount of the offering. It depends on the circumstances of the market,

what is happening to the industry and the company during that period of registration.

Q. It didn't happen during the Sloan secondary?

A. It did not, that is correct.

Q. Are you familiar with the secondary distribution of [fol. 2366] General Motors stock in the amount of 267,000 shares which took place, I believe, in the spring of 1958?

A. I am familiar with it. That is the one that was handled by the First Boston?

Q. Yes, sir.

A. Yes. I don't recall any details, but I know there was such an offering.

Q. You don't have any information?

A. I have no information on that, Mr. Reycraft. I didn't study that, because we didn't consider that large enough to be comparable to what we were discussing here today.

Q. Do you think the sale of 267,000 shares of General Motors is of virtual insignificance in terms of this problem?

A. It is, yes. In relation to this problem, I think it is insignificant, yes. In relation to a lot of other things, I wouldn't think so.

Q. Do you know, sir, how long it took to sell that particular secondary?

A. No, I do not, Mr. Reycraft.

Q. I believe the record shows that First Boston's books closed five minutes after they opened.

A. After the announcement? I don't know.

Q. Now with respect to the first Ford common stock offering——.

A. Yes.

Q. Your firm was one of the seven co-managers?

A. Yes, we were.

Q. Can you tell me, sir, how that issue was priced?

A. Yes. You mean the mechanics of making the price?

Q. Yes, sir.

A. Well, there were a lot of discussions. We had seven managers, and that is always a rather difficult problem when you are dealing with seven firms at once to get agreement.

Q. The seven firms have to get together?

A. Yes, first.

[fol. 2367] Q. And agree on the price?

A. Each firm got together its own price ideas and price views and had a meeting, and worked out what they thought was a reasonable figure. Then the manager who handled the books negotiated the price with the trustees of the Ford Foundation, and the price they hit upon was the final offering price of $64.50 a share.

Q. Now, do you know what the first price was which was agreed upon among the seven managing underwriters?

A. No, I do not.

Q. Was it lower than $64.50?

A. Well, underwriters always like to get the price lower if they can. I don't know whether any lower price was ever agreed upon. I don't think—there are a lot of prices discussed during the course of negotiations on pricing, but I don't know of any agreement on a lower price at any time or even any preliminary agreement.

Q. I don't want to make you nervous with that word——

A. No, not at all.

Q. Let me say consensus of opinion.

A. No, I don't recall that. I was not in the negotiations on that price, so I can't give you all the details that you want to have, and also there might be some confidential details I probably might not feel I could disclose to you even if I had been.

Q. Well, of course, if you have any such information and you wish to make a claim of privilege——

A. No, I have no such information, Mr. Reycraft, but I don't know of any preliminary—I know there were a lot of discussions on price over a period of time.

Q. Do you know that the price which the underwriters recommend was lower than the price which was set?

A. No, I do not.

Q. In your judgment, sir, if the original offering had been in a smaller amount, would the price at which Ford [fol. 2368] subsequently sold been greater or less?

A. That has a fair number of facets.

I will have to make a rather long, extensive answer to that.

Q. Go ahead.

A. There were 722 members of the Ford underwriting

group which, I believe, was the largest group in numbers of underwriters we have ever had on any issue in the United States.

There were a number of firms in that group whose capital was grossly strained by the size of their commitment. That had something to do with the after market action of the stock——

Q. Will you expand on that, sir?

A. Yes.

Each underwriter has a syndicate department, and our syndicate department and the syndicate department of all large underwriting firms has a list of the various underwriters and the firm capital of each firm.

Specifically, a member of the New York Stock Exchange that is in the underwriting business has to maintain capital at all times equal to 30 per cent of the amount of his commitments outstanding at any one time.

He can temporarily, perhaps, draw down capital from other sources where he is using it maybe in his commission business or his commodity business for that particular issue if he has a commitment that he is making larger than the normal commitment that he would have.

But, for example, in our own case, our commitments generally are limited at any one time to about $10 million.

In this particular case we needed 20 million dollars, so we had to get some additional capital temporarily switched over to the underwriting end to handle a commitment of this size.

Now, a firm of any proportion that was up against that [fol. 2369] problem and could readily sell the stock—and it would have been amazing if they couldn't have readily sold it, because there was a stupendous demand—would have moved as fast as it could to sell anyone to get out of that commitment in order to bring its commitments back in line with the capital that it had allocated permanently to handle that type of business.

So there was a great strain on the underwriting capacity as far as capital is concerned to handle a $658 million issue.

There were a number of other factors. There existed a number of free-riders, as we call them in our industry—people who bought more stock than they could afford to have by padding orders, putting orders with each of the different firms——

Q. I don't want to interrupt you, but when you make a long answer, I like to bring out some points.

These are people in the industry, are they not; not ultimate purchasers, but members of the syndicate?

A. I am talking about the purchasers themselves, individuals.

Q. Are you also talking about firms who participated in the issue?

A. No, I am not talking about firms, but there were quite a number of firms in the business who were not too knowledgeable in the underwriting business.

Q. Their motives were good, but they ordered more than they needed?

A. Yes, that is correct.

If the size of the issue had been reduced, there would not have been that same strain on the underwriting capital of the industry, and a number of firms would have been eliminated who failed to sell the stock to investors rather than speculators.

Q. How does a firm distinguish between investors and [fol. 2370] speculators?

A. Well, you know your own customers, and your attempt is always to not allocate to any individual more stock than he would ordinarily buy under normal conditions.

A number of people, naturally, want to buy a great deal of anything that they anticipate will go up four or five points immediately after the offering, but we follow the practice, and most people do in the industry, of allocating the stock and cutting the customers' demand down to his normal purchase, and in some cases much below that.

Q. Now, this may not apply to the Ford distribution, but with respect to a normal secondary distribution, doesn't it by definition require the customer to buy more than his normal demand for the stock?

A. No, it does not.

Q. Can you explain that to me? I have trouble with that.

A. More than his normal demand?

Q. Yes, sir.

A. In amount?

Q. Yes, sir.

A. No, I think it is his capacity to buy, and what he is

buying in effect in the secondary is usually General Motors in lieu of something else which he might buy at some later date.

Q. You think the customer then has a total demand not limited to General Motors stock necessarily?

A. That is correct. He has certain capacity for absorbing securities.

Q. And that is the way you evaluate the customer with respect to distinguishing between an investor and a speculator?

A. Well, we know his normal purchasing habits and patterns, and we know he is a 200 share buyer or he buys $10,000 worth of stock at any one time, and so we follow that pattern to limit him in every case.

If he can show good reason why he should have more and we can give it to him, why, then we will give it to him.

[fol. 2371] Q. Where you have a secondary of a stock which is already listed on the Exchange and available, it is new demand, as far as he is concerned with respect to this particular stock when he gives you a 200 share order?

A. It is new demand in that respect.

Q. Now, I believe I asked you some time ago whether, in your judgment, if the original Ford issue had been offered in a lesser amount, let us say 50 per cent, for convenience, there would have been any change in the subsequent movement of price of that stock?

A. I think there would have been a decided better price action of the stock if the offering had been five million shares instead of ten million, two hundred thousand shares.

Q. By a better price movement, you mean it would not have gone up after the secondary?

A. I think the stock would have gone to a larger premium, and that the subsequent price action would have been considerably better and the stock would not have dropped off and trailed off the way it did to around 54, as I recall it, by the end of the year.

Q. In your opinion, it would have sold at an even higher premium than it did?

A. It could have continued to sell, perhaps, around the offering price even in a declining market for automobile shares.

Q. Now, are you familiar with the Ford Motor Company's earnings after the date of the offering?

A. Yes, I am.

Q. Will you state what your understanding is?

A. I can't give you the exact figures. I don't have them here, Mr. Reycraft. I would have to go by my memory, but I think it will be reasonably good.

Q. That is acceptable.

A. In 1955, when the offering was placed in registration, [fol. 2372] the final offering price, as you know, was $64.50 a share, and that was slightly less than eight times the indicated earnings for the year 1955 which was, as you know, the biggest automobile year that we have had to date.

Q. And the best year Ford had had?

A. The best year Ford had had by a good margin. However, it was fairly well known that earnings in 1956 were going to drop off from 1955.

I brought with me the write-up that Moody's prepared, a special write-up, which they don't ordinarily do, on the Ford issue where they mention the fact that the industry was not going to do as well in '56 as it did in 1955.

Q. And the company itself issued a similar statement, did it not?

A. And the company itself also did that.

The pricing, however, was meant—it didn't, but it was meant to take that into consideration in that Ford was priced at less than eight times earnings, whereas General Motors at that same time was selling at 10.2 times its earnings.

Q. What was Chrysler selling at that time?

A. I cannot tell you what Chrysler was selling at at that time.

Q. Less than, say, eight times their earnings?

A. It possibly could be, but Chrysler has had a lot of very unusual difficult problems in recent years, as you may know, and their trade position was not nearly as good as Ford's was at that point, so that is a consideration there.

The Court: The Court will recess.

(Whereupon a recess was taken in the above-entitled cause until 2:00 o'clock p.m. of the same day, Thursday, March 26, 1959.)

[fol. 2373] Before Hon. Walter J. LaBuy, Thursday, March 26, 1959, 2:00 o'clock, p. m.

Proceedings resumed pursuant to adjournment.
Present: Same as before.
The Clerk: Case on trial.
The Court: Counsel may proceed.

WINTHROP C. LENZ, a witness called on behalf of the defendant E. I. du Pont de Nemours and Company, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination:—(continued)

By Mr. Reycraft:

Q. Mr. Lenz, before recess we were discussing the first Ford offering, and I believe you testified there were approximately 722 underwriters in that syndicate, is that correct?

A. Yes, that is correct.

Q. I believe you also indicated that even with that many underwriters there was some strain on the capital which was employed in the underwriting group?

A. Yes.

Q. Can you tell me, sir, with respect to the Ford offering how long that capital was tied up?

A. The capital was tied up, I believe, a matter of only a few weeks. I cannot tell you the specific time, Mr. Reycraft.

Q. Surely; but a few weeks would be approximately right?

A. A few weeks.

[fol. 2374] Q. Does that approximate the registration period?

A. About that length of time, yes, sir.

Q. And does it continue after——

A. It actually approximates the time that you have the signed contract, which would be just prior to the effective date until the issue is entirely distributed. In this case until the short position was covered.

Q. In a few days thereafter?

A. This was probably a matter of—I am not sure of these figures in time, Mr. Reycraft. I will have to give you an approximation. Probably two or three weeks.

Q. Altogether?

A. Altogether, yes.

Q. So that thereafter the capital would be available for other underwriting?

A. But at the time the registration statement went to Washington, in other words, was filed, the underwriting firms had a moral commitment, more or less, to go ahead on the basis of the amount that they were assigned, and they knew what that amount was, so that that capital was set aside in effect for that three week period and a further short period after the offering, maybe four weeks altogether, perhaps.

Q. Now, is it——

A. The actual commitment itself physically is short, but you have to have the money available well ahead of time for the commitment, so it might—in other words, what I am saying is it would have prevented a number of these underwriters that had engaged to go into the offering and into the issue, from doing anything else or going into many other pieces of business at that particular time during the registration until the short position was covered.

[fol. 2375] Q. And the normal amount of capital which you employ in the underwriting end of your business is ten million dollars?

A. No. That is the size of the commitments that we can have at any one time. We usually have about three and a third million dollars set aside for such commitments. The New York Stock Exchange says we have to be thirty per cent.

Q. Thirty per cent of your underwriting commitment?

A. Of our signed commitments in capital.

Q. Is it your company policy that ten million dollars is the maximum amount?

A. Yes. We have gradually raised it from 7½ to ten million. We find that adequate for most purposes.

Q. Can you tell me, sir, what the total amount of capitalization of your firm is?

A. $43,200,000.

Q. And, then——

A. That is a rough figure. I do not have the exact figure. That is about as of the end of the fiscal year.

Q. In the Ford issue you transferred sufficient capital to the underwriting end of the business to support a twenty million dollar commitment, is that correct?

A. That is correct.

Q. Which would be between six and seven million dollars?

A. That is correct.

Q. Now, can you tell me whether the other underwriters in the group had a problem similar to yours in terms of the proportion of capital which they ordinarily employed in the underwriting business?

A. I assume some of them had quite difficult problems and I am sure that they did, Mr. Reycraft, in that many of [fol. 2376] them would have to stay out of other issues entirely and perhaps might have to use some capital that might ordinarily be employed in other parts of the business, which might have curtailed other parts of the business temporarily during that period of time.

Q. And I suppose that one of the reasons there were 722 underwriters in the group was to get as much capital together as possible to——

A. That is right. It was necessary in effect to have almost that many people to get the necessary capital to carry that size of a commitment; yes.

Q. Do you recall, sir, how many underwriters were involved in the Sloan secondary?

A. No, I do not, Mr. Reycraft. No, I don't.

Q. Well, without being too precise, would you have any idea of the relative number, one-fiifth, one-seventh——

A. I would think it would be somewhere along those lines. Perhaps at the maximum—I do not want to make a guess, because I am not sure.

Q. Well, that is all right.

A. It would be substantially less; I mean, a fraction of that amount.

Q. Do you know, sir—Well, the reason, in addition to getting that capital available to underwrite the Ford offering, I suppose another reason was to get into the group people who had customers who they could contact, to whom they could sell the stock?

A. That is correct.

Q. So if you had a relatively small amount of stock you would need a proportionately smaller number of underwriters?

A. That is correct. Ordinarily so, yes.

Q. Yes; you do not know of any underwriting in which there was a larger group than Ford?

A. No, I do not. It is possible, but I do not think so. I have never heard of any.

[fol. 2377] Q. So do you think that comes close to representing the maximum resources of the investment group being mobilized?

A. Yes, I do. As a matter of fact, for all practical purposes, I would say that the number of underwriters that are in the current Ford offering of some three hundred twenty-three represents almost the maximum strength of the industry. The additional people were very small dealers, many of whom have seldom ever taken underwriting commitments or, if so, very minor commitments.

Q. And you are saying now that there are 323 underwriters in the current Ford offering.

A. I think that is a correct figure, three hundred twenty some odd. I think 323.

Q. They would therefore have a much smaller percentage of commitment as compared to the original Ford offering?

A. That is correct.

Q. What advantages does that have sir?

A. Well, it has the advantages of being able to conduct other business at the same time, go into other commitments, and in many cases perhaps be a lot more careful how the sales are made.

Q. They would probably be able to do a better job?

A. Do a better job, correct. That is true.

Q. We have heard the expression in this trial that efforts were made by underwriters to place stock in firm hands. Would you think that they can place the stock in firmer hands with a smaller and stronger group?

A. That is correct.

Q. Now, can you——

A. Every effort was made, I might say, in looking over what had happened before, to eliminate the offenders, the

firms that did not do the job the right way, or for one reason or another were not able to place it in firm hands.

[fol. 2378] Q. Well, it would follow logically, I suppose, that you would not want to give the business to a firm that didn't?

A. That is correct.

Q. And you have made every effort to eliminate those?

A. Yes, that is right, Mr. Reycraft.

Q. There are two million shares involved in this current Ford secondary, is that correct?

A. That is correct.

Q. And can you tell me what the current market price of Ford is?

A. I cannot tell you as of this moment, but it was 57 yesterday. I do not know what it has been today. I have not had a chance to look and find out.

Q. Do you know what the relative movement of the price has been since the announcement of this secondary?

A. If I may refer to a couple of notes here, I think I probably can tell you.

Q. Yes, go ahead.

A. On the date of the announcement of the offering, the price was—I am not positive of that exact date—was somewhat over 57. I am not sure of the exact fraction, but it was slightly over 57.

Q. And it is now 57?

A. It is now 57. It dipped to 54⅛—to 54, I guess, and recovered to as high as 59½ and is now about 57.

Q. Do you attribute the dip to the announcement of the secondary?

A. Yes, I do.

Q. To what do you attribute the subsequent price movement of 59?

A. To the news that the company's business in the early part of March was up substantially, and that they have attained a 28 per cent penetration of the market, with the Ford car, which is the largest penetration in quite some time for that company.

Q. You think that largely accounted for the 5-point increase in the price of the stock?

A. Yes, I do.

[fol. 2379] Q. During that period of time?

A. During that same time, I might say, that the news on Chrysler was also favorable, and Chrysler moved up as a result of the news on that stock from 55 and a fraction to 61 and a fraction.

Q. Do you anticipate that there will be any further movement in the price of Ford stock as the result of the announcement on the secondary?

A. I wouldn't want to hazard a guess on that, Mr. Reycraft.

There is one other problem I think here, that we are in the middle of the registration period, or on the tail end of that period, and I think maybe I should be very careful about making any further statement in connection with the Ford offering, because of the regulations of the Securities and Exchange Commission.

The Court: You may have a future customer in Mr. Reycraft.

The Witness: I would love to have him.

The Court: And there you may have the answer; that is, the right answer.

By Mr. Reycraft:

Q. I agree with you that you should be very careful in your answers, sir.

A. Yes.

Q. Now let me ask you a more general question with respect to your experience with secondary distributions.

I believe you testified that the increase in supply which arises from secondaries generally has an effect on the market price. Would that be correct?

A. That is correct, Mr. Reycraft.

Q. Are you able to see any distinction between this current Ford offering and other secondaries which you [fol. 2380] have had experience with in this respect?

A. Any similarity between the current Ford offering?

Q. Any reason why it would be any different.

A. Why it would be any different?

Q. Yes, sir.

A. No, I can't see any particular reason why there would be any major difference, except for differences in market

circumstances at the time. That is about the only difference I could see.

Q. You think the differences would be factors other than the supply and demand situation?

A. Well, I think they would both be quite important—I mean the factor of the market condition, which means supply and demand, and factors pertaining to the business, and profits, and dividends of the company.

Q. I realize, unfortunately, that you can't tell us what Ford stock is going to be selling for next week, but do you have any judgment as to the relative percentage of impact which this offering will have on the market price of Ford stock, that is, since you don't know the specific movement but you have expressed some judgments as to what the price would be, but for certain activities?

A. I think the impact was demonstrated by the dip in the stock from the date of the announcement of fifty-seven and a fraction to the fifty-four and a fraction level.

Q. And you think that is it?

A. I think that is the initial impact.

Now I think that the whole impact can't be measured until we have the final results in.

Q. But you think there will be some additional impact?

A. I also want to say in connection with the impact that the factors pertaining to earnings and the trends of earnings are quite important; and the fact that the trend is [fol. 2381] favorable and the stock has moved up, does not, in any way, lessen my thought that the impact was as great as it turned out to be.

Q. You think then, do you, that the impact of the supply and demand factor, shall we say, has been largely cancelled out at this time by news of the earnings?

Mr. Horsky: Your Honor, may I interject this? I think the witness ought to be informed that if he feels that he is coming to the point where he is in danger under the Securities and Exchange Commission regulations, he could so state, and let that be ruled upon by the Court.

You are entitled to do that, sir.

The Witness: I think in this particular point, I would have to invoke that privilege.

By Mr. Reycraft:

Q. What privilege is that, sir?

A. Of not discussing the reason or reasons for the recovery in price from the fifty-four and a fraction level to the fifty-nine level, and then the subsequent decline to fifty-seven.

Mr. Reycraft: And what regulation do you rely on, Mr. Horsky?

Mr. Horsky: Ask him.

By the Witness:

A. Well, there is Rule 3844, which pertains to information given out by underwriters and others in connection with offerings of securities while in the registration period or prior to the registration period.

Q. Well, you told me what the regulation pertains to, [fol. 2382] but what are the specific restrictions in the regulation?

A. Well, the restrictions in effect, as I see them, Mr. Reycraft, prevent too much in the way of opinions being given out pertaining to the issue or any news which might in any way stimulate the activity in the stock or the price of the stock.

They are rather vague and tenuous, I might add, and it is awfully hard for me to state specifically exactly what they are.

We have been trying to find out for quite some time and are not quite certain what the scope of the rule covers, but we have had a number of unfortunate incidents in the industry, and so we are rather under wraps so to speak, as long as an issue is in registration. Once the registration is over and the issue has been sold, why, we don't have any qualms about giving any information that is available or that we know about.

Q. And you think that any further opinion by you might stimulate the price of Ford stock?

A. I don't think so, but it might be so regarded, and if so, I would be in rather hot water.

Q. The prospectus on the new Ford offering, with which I assume you are familiar, and which I assume the SEC would have no objection to our discussing, indicates that

the Foundation may make additional sales from time to time. Are you familiar with that statement?

A. That is correct, yes.

Q. In your judgment—also, I might call your attention to the fact or remind you that the prospectus in the first Ford offering contained a similar statement.

A. That is correct.

Q. In your judgment, did the statement in the original [fol. 2383] prospectus have any influence on the market price of Ford stock subsequently?

A. It may have had some minor effect, Mr. Reycraft. I don't think there was very much of any because, I think, the average buyer or prospective buyer felt that the Foundation would not go ahead with the sale except under highly favorable conditions, and that therefore they would not in turn be adversely affected.

Q. The Ford Foundation does at the present time own 36,132,239 shares.

A. That is correct, yes.

Q. Of this amount, two million is involved in the current offering?

A. That is right.

Q. And the prospectus indicates that the other 34 million may be sold at some time in the future?

A. That is right.

Q. Subject to the discretion of the Ford Foundation?

A. That is correct.

Q. Is it your testimony that these statements have a very slight effect on the market for the Ford stock?

Mr. Horsky: I object, your Honor. That is asking him for information about the current offering, which I think he has indicated he does not wish to answer.

Mr. Reycraft: I will limit it to the first prospectus.

Mr. Horsky: Very well.

By the Witness:

A. I think I stated, Mr. Reycraft, that it had very little effect on the initial offering because the buyers and prospective buyers presumed that the Foundation would not go ahead with the second offering except under favorable conditions which would not adversely affect them as far as

their position as stockholders of the Ford Motor Company was concerned.

[fol. 2384] By Mr. Reycraft:

Q. Do you think the average buyer assumed that unless the Foundation felt it could market the stock without adverse impact, it would not do so?

A. I think that is correct.

Q. Would you be able to make an estimate of the percentage of impact of the statement in the first prospectus?

A. I don't think there was any real adverse impact that could be measured. It would be very minor, very small, because the buyer and prospective buyer, in addition to feeling that they would only do it under advantageous conditions, felt that there was a long time interval that would probably pass before the next offering. In other words, that it was under complete control of the trustees as to when and why they went ahead, and that there would be no forced sale or no time element involved as to the making of the next offering.

They felt that the initial offering would be completely absorbed, that the stock would have matured in the market, and that the loose stock would be all taken up and would be in strong hands at a later date, and that it wouldn't hit them, in other words, unawares.

Q. Can you answer my question whether you are able to make any percentage estimate?

A. No, I can't, but if I made an estimate it would be very, very minor.

Q. In your judgment, what is a minor percentage?

A. One per cent; two per cent.

Q. Now, how would you go about, shall we say, confirming this opinion?

A. I am not even sure it would be that high. I think it would be very, very minor.

[fol. 2385] Q. Yes, very minor. How would you go about confirming your opinion with respect to that percentage?

A. I think the only way you could go about it is to go back and ask people who bought the initial offering, or firms that were in the business, as to whether or not any of them felt that there was any change or any impact on the market price as a result of the possibility of such an addi-

tional offering. That would be the only way I would know to do it.

Q. Would you be able to do it by reference to statistics or to price earnings ratios?

A. Price earnings ratios?

Q. Yes, sir.

A. No, I wouldn't think so, Mr. Reveraft.

Q. Only by asking the opinion of the people who had been involved in it?

A. Yes.

Q. Now, in expressing the opinions you have here——

A. Actually the Foundation could have waited for many years, as far as they were concerned, before they made an additional sale, and consequently when you have a long period elapsing from one offering to another, even if it did have a minor impact, the initial offering would have fully recovered from any such minor impact.

Q. Well, within a few weeks, I suppose it would be accurate to say that they have sold 12,200,000 some odd shares within three years?

A. That is correct.

Q. In your judgment, with no adverse impact on the market up to the date of registration, so we are keeping out of trouble with the SEC.

A. Yes, I think that would be a fair statement, because of the length of the time that elapsed.

Q. Because of the three-year period?

A. The three year period, that is correct.

Q. Now, you said your firm participated in the Sloan secondary?

A. Yes, we did.

[fol. 2386] Q. So I take it you felt it your duty to familiarize yourself with General Motors stock as an investment stock?

A. In connection with that Sloan secondary, I would like to point out that I mentioned an impact of almost five per cent on the market.

Q. Yes, you did.

A. From the closing price on the day before the announcement to the offering. I frankly don't know when the news was out as to when this issue was coming to market or the fact that it was coming to market, but I have some

figures here which we had in our office which shows that prior to the date that I took, the 46 closing price on April 2nd, that General Motors was far higher than that at the close on March 16th, which was the end of that week, and at the closing of March 23rd, which was the following week, 48⅛.

So that if it were known that that offering was taking place toward the latter part of April, the impact was far greater than I indicated in my previous testimony from the date that it was known, if it was known in that period, than the date that I selected.

Q. Well, do you think we should pay any serious attention to that estimate based on the facts which you have stated?

A. I am merely getting around to the point that I feel that the impact stated of less than five per cent is a fair figure.

Q. Of less than five per cent?

A. That is right, slightly less than five per cent.

Q. You are inclined to——

A. It may have been a great deal greater if the knowledge was out at the time the stock was selling at 48⅛.

Q. Do you know that it was?

A. I don't know whether it was or not. No, I don't know.

[fol. 2387] Q. Do you still disagree with Mr. Emerson's estimate of 2.9 per cent impact?

A. Yes, I do, although it is a different period. I can agree with the computations for the period he has selected. I think the period that I have selected is a fair period for the impact, and perhaps my estimate of the impact is far on the low side due to this other matter that I just mentioned to you at this moment.

Q. Would you want to rely on the assumption that it is too low?

A. It is the proper figure for the period he selected. The only quarrel I have is with the period. I think the period that, in my judgment, has been selected is the proper period for the computation.

I think you will find that on that chart of secondaries, that they averaged prices for certain days to compute that impact, and I don't think that that is the proper way

of figuring that impact, averaging prices over a period of days.

I think the impact takes place when the knowledge first is known or from this date of the announcement, whichever is the major factor, generally when it first becomes known. But this, I think, was when the knowledge got around, the date that I picked, the 46 figure on April 2nd.

Q. Well, it is pretty hard to tell what the impact is, isn't it?

A. That is—Well, I don't think anybody can measure it with a T-square or by any scientific instrument, but you can tell whether it is adverse and you can tell to some extent the degree of adversity.

Q. And experts would disagree as to both from time to time?

A. It is possible.

[fol. 2388] Q. You and Mr. Emerson disagree?

A. We both agree that it is a negative impact.

Q. Would you explain, sir, the distinction between the sale of securities on an underwriting and on a best efforts basis?

A. I am not an expert on that subject in that we very seldom handle any large block on a best efforts basis. We feel that if the issue is not a good enough issue to make a commitment in, then we shouldn't be doing the business in the first place.

We do, however, once in a while, handle small blocks of stock on a best efforts basis, knowing they can be sold, in order to reduce the commission and the fee to the seller.

Q. So since you are taking less risk on a best efforts basis, you sometimes do it for——

A. At a lesser figure.

Q. For a lower fee?

A. Yes. If we had a block of stock of 30 or 40 thousand shares of some well known company, we would do it on a best efforts basis in order to reduce the fee because there is less risk. Naturally there is no risk, as far as we are concerned.

Q. I asked you a few minutes ago, and I don't believe you answered it specifically whether, since you have participated in both the Ford and the General Motors Sloan

offering, how you would compare the two stocks as to their investment quality?

A. It is a rather hard question for me to answer. I don't think there is any question about the fact that the average financial analyst feels that General Motors is a far better diversified operation and that, consequently, it has somewhat greater investment values.

Now, that doesn't mean that it is a better purchase or a better stock to hold than Ford because it is entirely possible that the Ford Company would show a much more substantial appreciation than General Motors under favorable conditions because, as I recall it, the company does about [fol. 2389] 40 to 45 per cent as much business as General Motors and only has one-fifth as many shares of stock outstanding.

So that the leverage is greater, and if they have proper efficiency, they could make many more dollars per share than General Motors.

Q. That leverage works both ways, doesn't it?

A. Leverage works both ways, unfortunately, sometimes.

Q. So that it could go down faster?

A. It could go down faster.

Q. Have General Motors' earnings been more stable than Ford, in your experience?

A. Yes, they have.

Q. Have the dividends been more stable?

A. Yes, definitely so.

Q. Are you able to attribute any movement in the price of Ford stock since the time it has been sold on the market to the earnings of record of the company?

A. Yes, there is no question about that, that aside from the factor that we have been discussing of supply and demand, possible sales of big blocks of stock, ordinarily were it not for overhang of large blocks or forced sales, stocks generally move in line with earnings or anticipated earnings and to some extent with current yield as a result of dividends as long as the dividend is safe.

Q. Then when you introduce a new element, the change in supply and demand situation, you get an impact, I believe you testified?

A. You usually accentuate the impact.

Q. You accentuate it or you create an impact?

A. Well, you can distort the relationship of price times earnings very substantially with increased supplies of stock [fol. 2390] for sale. Stock selling at twenty-five times earnings can dip to twenty as the result of any kind of substantial selling, regardless of the earnings and the earnings trend at that particular time.

Q. Well, this supply and demand situation would apply then to every secondary, would it not?

A. Yes, it does.

Q. Do you recognize this as an advertisement which your firm placed in the Wall Street Journal?

A. Yes, sir, very well.

Mr. Reycraft: May I have this marked for identification Government Exhibit No. 541, please?

(Thereupon said document was marked Government Exhibit No. 541 for identification.)

By Mr. Reycraft:

Q. Mr. Lenz, let me ask you first whether you know which department or division of your firm compiled the figures in this advertisement?

A. Yes, I do.

Q. Which one, sir?

A. It came out of our retail department, that I mentioned to you this morning, of the sales division.

Q. Do you believe the figures contained therein are accurate?

A. Yes, I do.

Q. Will you explain, sir, the three columns of figures which appear in this paper?

A. The column "Shares We Sold" indicates the number of shares that we sold through our own organization to our own retail customers.

The next column is the number of individual purchasers, and then the various number of States in which the shares were sold.

Q. Now, can you tell me what year or years are covered by these figures?

A. This is the year 1958, last year.

[fol. 2391] Q. So that all of these transactions took place during 1958?

A. That is correct.

Q. And they are all secondary distributions?

A. Some of them were exchange distributions which we handled entirely through our own organization. That is another method of handling sales or purchases of large blocks. It is a method which differs from a secondary primarily in this respect, that it involves smaller blocks of stock than secondaries.

I might explain just one step further, that if we had a block of stock of 100,000 shares of Phillips Petroleum Company, for example, and we thought we could do an exchange distribution, we would notify our offices that we contemplate doing same, and to send in orders, and the orders would build up.

If we were unable to handle the whole 100,000 shares, we would then apply to the New York Stock Exchange to see if we could switch it over and make it a secondary to get the benefit of the other firms' purchasing power.

Q. You would then use both forms of distribution on a single sale?

A. It could be possible. Ordinarily that is not true. The exchange distribution is usually a block of stock which is small enough or large enough, depending on how you look at it, so that we can handle it through our own organization entirely without bringing in any other underwriting firms or dealers to help us sell it.

Q. Can you tell me the maximum capital commitment which would ordinarily be involved in an exchange distribution which you handle strictly within your own firm?

A. Most of the exchange distributions are small enough and can be done readily enough so that they are done on a best efforts basis. We do not need to usually make commitments in those offerings.

[fol. 2392] Q. Well, I see here 60,000 shares of American Electronics, Inc., which is apparently handled entirely within your own firm.

A. That is correct.

Q. And do you know how many days it ordinarily takes to handle an exchange distribution of this type?

A. An exchange distribution of that type can quite frequently be done in a matter of hours; however, in the case you cited I believe it took several days because it was

not a very well-known company in the East and a fair amount of information had to be put out to build up the interest. But if you cited a popular New York Stock Exchange stock——

Q. Let's take Standard of New Jersey, which is over in the right-hand column, the 35,285 shares.

A. That could be done in a matter of hours.

Q. And even a few hours would be——

A. Yes, possibly. Maybe one hour, maybe two hours from the time of the announcement.

Q. And you did this ten or fifteen times within your own organization just during 1958?

A. That is correct, Mr. Reycraft.

Q. And these other figures where the distribution was not entirely within your own organization are only your share of a particular secondary, is that correct?

A. They are only our share of a particular secondary, or they might be—well, take a case in point. Well, yes, those would only be our share of the particular secondary, that is correct.

Q. Now, is there a different group of buyers or customers of yours whom you would contact on these various types of distribution?

A. Depending on the type of stock and the type of security. If you had a highly speculative security that you [fol. 2393] still thought was worth selling to your customer, you probably might call different customers than you would if you were talking about Standard Oil of New Jersey, but they would be—specifically they would be our own customers, I mean. They are the same customers but they might be different people for each issue, depending on the circumstances.

If we knew a man owned a lot of Standard Oil of New Jersey, we might not call him because we might be calling the other people first. That would be the only difference.

Q. You would think the people who did not have it would be more likely to buy it?

A. Not necessarily, but if we thought a fellow had enough, we might not call him, thinking we had a better prospect over here where he did not have any.

Q. Where he did not have some and you thought perhaps it would balance his portfolio?

A. Balance it out, or what not. Yes, sir.

Q. And I believe you testified you have somewhere in the neighborhood of 400,000 customers?

A. That is correct.

Q. And I assume your salesman would make some evaluation among the number each one contacts as to which are prospective buyers of particular types of stock, and perhaps he would sell to the same customer a number of different stocks?

A. That is correct, yes. That is very true. There are a number of customers, for example, who have had quite a good deal of success in buying issues through secondaries, and they are usually good prospects for others.

Q. So that your 400,000 customers are prospective purchasers for virtually any good common stock?

A. That is correct.

[fol. 2394] Q. Now, you have testified, sir, concerning some situations in which you would begin with an exchange distribution and where you might want to switch to a secondary. Can you tell me what the registration requirements of the SEC are with respect to such a distribution?

A. There are no registration requirements necessary unless the issue would involve control stock.

Q. Unless it is a controlling person?

A. Or controlling persons, yes, sir, or someone in a similar capacity.

Q. Now, can you tell me whether you have occasion to make large purchases for customers of yours?

A. Yes, we do on occasion. I would say that perhaps there are a number of other firms that do more of that business, because they have more large customers than we do, but we do make purchases from time to time of large amounts for a particular customer.

Q. Can you recall the largest single purchase you made during 1958, or one of the largest?

A. For one account?

Q. Yes, sir.

A. Well, I would not be too sure about this, but I think it might be a block of 25,000 shares of Winn Dixie, which is a Florida retail food chain, selling at about 44, 45 dollars a share on the New York Stock Exchange.

Q. Was this for an institutional purchaser?

A. The purchaser was an institutional purchaser, yes, an insurance company.

Q. An insurance company?

A. Yes, sir.

Q. I won't ask you anything more specific about that.

Can you tell me, sir, whether you would be able to purchase stocks in amounts equivalent to these blocks which [fol. 2395] you sell through your organization?

A. Whether you could buy blocks of that size freely or at any time?

Q. Yes, sir, freely on a consistent basis as compared to the stock you sell.

A. I would say that you could not. It would be very seldom that you can purchase blocks of this kind.

Q. Why is that?

A. Readily and easily.

Because, Number 1, the things that we are selling here are the things that we recommend for purchase; and it is not too often that the institutions are selling those kinds of securities, so it is hard to buy them. Consequently, the time when you can buy would ordinarily be a time when some institution might be selling for diversification. If we knew it had 30,000 shares of General Motors for sale, and we had a couple of pretty good prospective buyers and we found out that they had an interest in making that purchase, I assume that we would then make that purchase off the floor of the New York Stock Exchange on a private placement basis.

But I might mention in that connection that the rules and the regulations of the Exchange are that two commissions must be charged on that transaction; there must be a spread of two full commissions. For example, if we cited General Motors, 30,000 shares, at 45, with the commission at 41½, that would mean 83 cents commission.

Now one commission could be paid by the buyer, and one by the seller, but it has to be the two commissions.

Q. Now why would you make such a purchase off the Exchange?

A. Because it would be easier under those circumstances, [fol. 2396] assuming the buyer and seller are satisfied with the price, to effect the transaction without disturbing the market.

Q. Do you think that purchasing stocks in quantities

indicated on this Government's Exhibit 541 might disturb the market?

A. The purchase of stocks of that size, Mr. Reycraft?

Q. Yes, sir.

A. It could or couldn't. It would depend upon the method followed, and the purchase and the time, and the risk involved. If, using our same example—or maybe we should use a better one than 30,000 shares of General Motors. If we said 50,000 shares of Atchison, Topeka & Santa Fe Railway Company, and we wanted to buy that amount on the floor of the New York Stock Exchange, it might be possible to buy that stock without increasing the price, if you went about it very carefully and you didn't care how long it took you to get it, and the buyer would assume the risk that the price might run away from him and he would never get it at all or only get a very small portion of it.

Q. If people knew that he was in the market looking for 50,000 shares, they would be inclined to want a little more money for it?

A. If they knew that, yes. But sometimes those transactions can be handled very carefully on the purchase; but ordinarily unfortunate, somehow or other, that same secret is pretty hard to keep, and if it becomes known it is pretty hard to buy, sometimes almost impossible. There, again, it depends on the condition of the market.

Q. Well, limiting ourselves to the Atchison, Topeka & Santa Fe, is it clear that it is a substantially more difficult problem to buy 50,000 shares than it is to effect this sale which is referred to in this exhibit?

A. It is much harder to buy that amount of stock than it is to effect the sale.

[fol. 2397] Q. And if that same amount is purchased on the Stock Exchange, would it, in your judgment, have a greater impact on the market price than a sale of a similar amount?

A. There again it would depend on how the stock was sold. The method that we used here is a method that has been found to make the least impact. It can be done sometimes without any impact at all, if the block is small enough, or in relation to the size of the market. But if 50,000 shares of Atchison were to be sold, if it were to be handled as the purchase I described, and the seller didn't

care how long it took, he might be able to effect the sale just as readily as he could the purchase without disturbing the market.

Q. It might be just as easy, but it would take much longer, is that it?

A. It might take him a longer time, and he would again have the risk of getting a much worse price later on if he didn't go ahead right away.

Q. Do you have a copy, Mr. Lenz, of du Pont Exhibit No. 47, the Aluminium chart?

A. No, I do not have it here, Mr. Reycraft, with me.

(Document handed to the witness.)

Q. Mr. Lenz, I believe you testified, that this chart, in your judgment, indicates that there has been a price impact on Aluminium stock resulting from the divestiture in the Aluminum case, is that correct?

A. Yes, I did.

Q. I wasn't too clear as to how much of an impact you thought did occur as a result of that divestiture. Would you be able to tell me?

A. I wasn't able to determine the relative amount of the impact, Mr. Reycraft, because I think I said that we didn't have access, in connection with the Aluminium divestiture, to all the data and information that was compiled in this [fol. 2398] case by both the Government and the du Pont Company, and it was very difficult to attempt to trace all of the various operations in connection with the sales of the various blocks, the way they were sold and how they were sold, and all the other items in that connection.

I think I did say that our research specialist, who has been handling the aluminum stocks for quite a few years now, has been convinced for quite some time that there was an adverse impact on Aluminium Limited as a result of all these various incessant sales of stock.

Q. Is this your opinion, sir?

A. My opinion is that there is and has been an adverse effect. The amount I can't substantiate, because I do know —and it is only proper to say—that there were a number of other adverse factors from time to time which bothered the Aluminium Company.

Q. What are they, sir?

A. There was a water shortage at one time which made it impossible—in Canada—if my memory serves me correct, to produce aluminum; there was a scare of Russian dumping of aluminum not too long ago, probably a year ago, that was exaggerated, as a lot of those things usually are. The amount was not as great as everybody forecast and, as a result of that, the company was unable to at one point, or felt that they were unable, to increase the price of aluminum commensurate with the increases which took place by Alcoa, Kaiser, and Reynolds, the domestic companies.

Q. Now referring to 1956, which is indicated on this chart, there is a very substantial dip in deflated price of Aluminium. Can you tell me whether you attribute any part of that dip to the——

A. I didn't attempt to break it down into any given year or any given period. I felt that this was a program of sales [fol. 2399] over an extended period of time, and the only important thing was whether or not there was an impact from the time that the decree was handed down to the present date, and what was the nature of such impact—whether it was adverse or not—and I decided that it was.

Q. You think there must have been an impact?

A. Yes, I do.

Q. But not based on any study of Aluminium stock, I take it?

A. Based on as much as we could obtain in the way of information from our studies of that stock.

Q. Well, is there any information which you considered in forming your opinion which is not set forth in this exhibit?

A. No, I have no information here that would—we have looked at all these companies individually and gone into all their records, and the pros and cons, and come up with this opinion and this weighting; but we haven't any study here to substantiate or verify that opinion.

Q. You are satisfied that the figures indicated on this exhibit are accurate?

A. Yes, I am.

Q. But you are unable to say in any way, are you, to what extent any movement in price of Aluminium is attributable to the divestiture?

A. I think it is obvious to anyone that it would be impos-

sible to have action as contrary to the stock composite as the action of Aluminium, unless the company was making no money at all and the business had pretty much gone to pot, so to speak, which is not the case in this company's record.

Q. Do you know how its price-earnings ratios at the present time compare with Alcoa, Kaiser Aluminum, and Reynolds?

A. No, I do not.

[fol. 2400] Q. Would you think that a significant factor in forming an opinion?

A. That is a significant factor in forming any opinion on the price-earnings ratio, and is always important.

I could cite other factors also that are important.

In the case of Aluminium, which I believe is selling at 29¼ dollars a share as it closed yesterday, it had a cash flow last year of about $2.37 a share, so that there are figures in price-earnings ratios that go beyond just merely using the reported earnings after taxes.

Cash flow is an important factor, and we have a very substantial cash flow of $71 million in the case of this particular company.

Q. Well, in your judgment, does this adversely affect the market price of the stock?

A. I didn't get your question, Mr. Reycraft.

Mr. Reycraft: Will the reporter please read the question?

(Question read.)

By Mr. Reycraft:

Q. The cash flow.

A. The cash flow? Adversely?

Q. Yes.

A. No. It favorably affects the price of the stock.

Q. Can you tell me how it compares with the cash flow of these other three companies?

A. I cannot. I can't cite those figures to you.

I wanted to mention the fact that there have been a number of—one of the reasons that we felt that there was an adverse impact on Aluminium was that both Kaiser and Reynolds Metals have had a great many issues of securities which resulted in additional stock coming out during [fol. 2401] this same period, so they had to combat the problem of additional shares.

Q. They had the supply and demand problem also?

A. They had a supply and demand problem also.

Q. Were those issues rights offerings?

A. Some of them were, yes.

Q. And you think that affected the supply and demand situation?

A. Yes.

Q. Do you know, sir, how many shares were involved in the Aluminium judgment?

A. I haven't the figure here, Mr. Reycraft. My memory is that it is around 7 million. I am not sure of the exact figure.

Q. But that is pretty close?

A. I had the figure; I have seen it, but I am not certain that that is the correct figure. It is about right, I think.

Q. Do you know what percentage of the equity of Aluminium was involved in that divestiture?

A. I think it was 37 or 38 per cent, I believe.

Q. It might be a little higher than that?

A. It might have been a little higher than that. I think the voting rights had to be given up by additional holders.

Q. Now did you make any attempt to correlate the sales under the judgment with the price movements of Aluminium?

A. Yes, we did. There were so many sales in so many different ways, we weren't able to come to any proper evaluation on that score, because, as you know, there were a number of sales that were made off the regular beaten channel, private placement; there were sales on the New York Stock Exchange, and there were a number of secondaries, some registered and some not.

Q. They used all three methods that we have been talking about?

[fol. 2402] A. All three methods were used, yes, that is correct.

Q. And you say you did make some attempt to correlate these sales with the price movements?

A. That is correct.

Q. What were your results?

A. The results were we felt there was a decided adverse impact on the stock.

Q. Well, did you use a pencil and paper, or did you just examine a series of charts, or what did you do?

A. I think we used everything we could possibly use. We studied the charts, we studied the price movements, we looked at volume, and we looked at all those various things. We couldn't come to any percentage figure, as I stated before, but we were convinced that there was an adverse impact.

Q. Now, who did this work, sir?

A. Mr. Seder and a number of his associates together with our——

Q. Is Mr. Seder the gentleman sitting over in the jury box?

A. He is.

Q. And you accepted Mr. Seder's opinion, is that correct?

A. I have always accepted his opinion.

Q. Is he your specialist on aluminum stocks?

A. No, he is not. He is a member of our buying department, but we work always very closely when we get into one of these problems with the research specialists, and with anybody that has specialized knowledge in that field.

Q. Did Mr. Seder do a considerable amount of research in connection with your testimony?

A. Yes, he did.

Q. Did he place his conclusions on paper and submit them to you?

A. No, we had a stack of stuff which we waded through to eliminate the things which we thought were useless and the things we thought were of some merit. We discussed them, and came to a conclusion, but [fol. 2403] we couldn't save everything we had gone through because if we did that, we wouldn't be able to carry it out here.

Q. And you made no specific analysis on paper?

A. No specific analysis on paper. Our problem was to deal primarily with the Government's final judgment in the du Pont suit, and we couldn't go into the Aluminium problem the same way we would in the study of this particular case.

Q. You didn't go into it very much then?

A. Yes, we did.

Q. But not much, compared to what you did in connection with this case?

A. Not compared to this case, that is right.

Q. Now, because you testified that you took this divesti-

ture into consideration in forming your opinion, I would like to ask you when, in your judgment, the impact on the market price of Aluminium stock was most pronounced?

A. Well, it became, I think, fairly evident that it had a highly detrimental influence since mid-1953.

Q. Since mid-1953, you think it has been especially detrimental?

A. That is right.

Q. You think the sales from that period on had a very great impact on the stock?

A. Yes, I do.

Q. Do you know what percentage of the stock had been sold by 1953?

A. I don't have those figures in mind. I have seen——

Q. Did you ever know them?

A. I have seen a schedule of all those figures, but I don't remember exactly what percentage in dollars or in shares. I know there was one year in which they sold on the stock exchange, and I am not sure whether it was 1953 or not— [fol. 2404] it may have been 1953—in the neighborhood, and that figure also, I believe, included other sales that might not have necessarily been on the stock exchange but were included in that category, of pretty close to 600,000 shares, I believe, in one year.

Q. But the greatest impact, I think, you testified occurred after 1953?

A. I think that is correct.

Q. And during the first three years, do you think there was a relatively minor impact?

A. Yes, I think there was—I wouldn't say there was a minor impact, because I can't evaluate that to that point. I think there was an impact, and I want to stress the fact that the succession and continuity of sales is the thing that really hammered the market over a period of time. It is the consistency of selling that destroys and gluts the market.

Q. And you think that from 1953 on, the Aluminium——

A. I think in the very early period of the divestiture, a great deal of this stock was locked up in the control interest.

Q. And overhanging the market?

A. And that when they made available some stock in the

beginning, there were a number of buyers because there was only a limited number of shares available for the public market.

Now, when you began to satisfy that demand and successive blocks came out, then you had destroyed and distorted the supply and demand situation. There was no longer the same number of eager buyers that there was at the earlier period.

Q. Did your firm participate in the management of any of these offerings?

A. No, we did not.

[fol. 2405] Q. Do you know which firm did?

A. First Boston Corporation.

Q. Did they manage all these offerings?

A. I think they managed, Mr. Reycraft—I believe they managed all of them. I haven't got that record here with me, but that is my recollection, and I think that is correct.

Q. Do you think their judgment would be very good as to the degree of market impact of the divestiture?

Mr. Tierney: I object to that.

Mr. Horsky: May I hear the question, please?

By the Witness:

A. No, I do not, Mr. Reycraft.

By Mr. Reycraft:

Q. You don't think so.

A. Because they have an interest in protecting the client.

The Court: Is the objection withdrawn?

Mr. Tierney: It is too late, your Honor.

By the Witness:

A. (Continning) And if they felt so, I don't think they would be able to say so.

By Mr. Reycraft:

Q. You think they are prejudiced?

A. I do. I would be also, I will say that.

Q. You would be also?

A. Probably.

Q. Now, you participated in the Sloan secondary. Are you prejudiced as far as that issue is concerned?

A. We were not the manager. There is a great deal of difference between a participant and a manager.

The manager is working closely with the company and [fol. 2406] has a fiduciary relationship with the company. We feel free to say anything we want to within reason on General Motors or any other stock. If we are the manager, therefore, and we don't like what the company is doing, we kick the business out the window, but we do have——

Q. During the time you are handling it, you are prejudiced, probably?

A. Doing what?

Q. During the time you are the manager, you may be prejudiced?

A. We might be prejudiced, but we are not ever going to try to sell anything unless we believe it is something that should be sold. We never have and never intend to.

Q. Does this apply to managers of stock generally, do you think?

A. Generally, I think so. We have some people in our business, like any other business, where they will sell anything if there is a dollar in it. I won't name those names.

Q. You don't include First Boston in that, do you?

A. No, I do not.

Q. Do you know Mr. Townsend of First Boston?

A. Yes, I do.

Q. Do you think he is prejudiced as far as Aluminium is concerned?

A. I don't know, because I don't know what he has had to do with the Aluminium. I don't know how close he has been to the management or whether he has headed up any of the underwritings they have worked on in the past with that company.

I think that anybody in that organization would be prejudiced in favor of Aluminium. I want to say this, also, that the impact is separated from this question to this extent: When you sell blocks of stock, the buyer is only interested in making a profit, and if his profit is less than [fol. 2407] it would have been if it were not for such impact, he is not too worried about it, as long as he makes a profit, unless he begins to make comparisons with what other stocks have been doing during that period of time.

So that in all good conscience a firm could sell a block which has a detrimental effect as long as the buyers over

a period of time make a profit, a reasonable period of time. That is their main concern.

I think in most cases these buyers have made a profit because we have had a very, very strong market for aluminum stocks since Korea, and even the companies that are showing a declining earnings trend have had stock move up substantially. But, nevertheless, that does not in any manner, shape or form lessen the impact that results from successive sales and successive blocks of stock being put on the market.

Q. Do you think, sir, that Mr. Emerson is prejudiced with respect to companies whose issues his company manages.

Mr. Tierney: If the Court please, I object.
The Court: Sustained.

By Mr. Reycraft:

Q. Do you know anything about the expansion of the Aluminium Company over the period of this divestiture?

A. Not in any specific degree. I know that all of the aluminum companies have been expanding very rapidly. The metal itself is taking the place of copper and other items in many fields, including the utility field, and most analysts feel that there is an unlimited growth as far ahead as they can see for the metal and the industry itself [fol. 2408] Q. Now, I believe you testified with respect to the opinions you formed on the Government's proposal in this case that you relied on tax figures supplied by National Analysts to reach your quantity conclusions?

A. That is correct.

Q. Have you made any independent computations as to what the amount of selling might be?

Mr. Horsky: May I ask to have the question read?
The Witness: Specifically——
Mr. Horsky: Just a moment.

(Question read.)

Mr. Horsky: I don't understand the question.
The Witness: I don't understand it either.
Mr. Horsky: What has that got to do with National Analysts?

Mr. Reycraft: It doesn't have to do with National Analysts.

The Court: Will you be more specific, counsel?

By Mr. Reycraft:

Q. Have you made any computations yourself, or has Mr. Seder or anyone with your firm made any computations with respect to the amount of General Motors stock which it might be anticipated would be sold if the Government's proposal is placed in effect?

A. That is, General Motors stock?

Q. Yes, sir.

A. In addition to the two million shares sold annually by the trustee?

Q. We can take the two million specifically.

A. We made all kinds of computations to try to satisfy ourselves as to the conservativeness of the estimate that we finally came up with.

[fol. 2409] Our initial calculations with respect to the amount of General Motors that might be sold by the recipients in the distribution were considerably in excess of the figure I cited of a million plus shares. To be conservative and eliminate the wide margin of error that could take place in this thing, we settled on this million plus.

I don't know whether that is a satisfactory explanation or not, but there is no scientific approach here. We have to use our best judgment as to the impact of the taxes.

The fact that somebody is hurt tax-wise and would be better off doing something else doesn't necessarily mean that he is going to do it. We can't find out or anticipate what each man will or will not do.

We know that as far as our own clients are concerned that a great many of them who receive the distribution will sell, and that in addition to that, existing General Motors holders who are clients of ours will also sell.

Now, I think that the million plus figure is highly conservative. The amount that would come from the existing holders over and above that is anybody's guess.

There, again, I would like to stress the fact that the amount of stock offered for sale can be far different from the sales that actually transpire because if the impact on the market is too deep, the seller will withhold his sale or

his order in the hope that there will be some recovery, that he can get his better price.

Q. Let me ask you whether, in the event that there was a secondary distribution of General Motors in the amount of two million shares a week or two from now, rather than Ford, do you anticipate there would be any difficulty in [fol. 2410] selling that stock?

A. I think at the moment that there is very little knowledge in the minds of the public and in the minds of the stockholders of General Motors, and even among financial experts, as to details of the Government's proposal, and what it may or may not do to the stocks of General Motors and du Pont.

I think most people feel, rightly or wrongly, they are hopeful that there will be either a change or a modification in the proposal or the proposal will not be approved, and that over and above that, that the Frear Bill or some similar legislation will be passed to remove the tax effects.

Consequently, it would be possible, in my judgment, to sell a block of General Motors, but I can't answer for the impact in this particular case because if we had such a large block for sale, we would have to, and all other firms and all other fiduciaries, would have to make known the effects as we saw them of this particular proposal.

I am not certain that a number of firms under such circumstances would be willing to commit their capital and take an underwriting position in such a secondary with this potential of the adverse effect hanging over the market, so you can't state for a certainty that this thing could be sold except perhaps at some concession in price.

Q. You referred, sir, during your answer to a modification in the proposal. To what modification do you refer?

A. I do not refer, Mr. Reycraft, to any specific modification, although we know that some modifications would be helpful in some ways and perhaps harmful in others.

Q. What would be helpful?

A. The twenty-year modification, I think, is beneficial [fol. 2411] as far as we are talking about the offering of a block of stock from the trustees is concerned, but highly detrimental as far as the General Motors Company itself is concerned in connection with its possible new financing in equity capital.

Q. Can you suggest any modifications which, in your judgment, would be helpful?

Mr. Horsky: I object, your Honor. I don't think the witness is called upon to do that.

The Court: Sustained.

By Mr. Reycraft:

Q. You have testified, I believe, with respect to the effect of a twenty-year period rather than the ten-year period.

A. Yes, sir.

Q. And you have testified as to one helpful effect and one harmful effect. On balance, in your judgment, is it helpful or harmful?

A. I do not think anything that has a harmful effect on a company, that is, one of the premier companies in our premier industries, is ever a good plan.

Q. Is that the answer?

A. That is my answer.

Q. And you testified, I believe, with respect to your conclusion in the event that the sales involved were limited to 20 million shares over a ten-year period.

A. Without any tax problem involved, Mr. Reycraft?

Q. Yes.

A. Yes, sir.

Q. Will you tell me, sir, what your conclusion was in that respect?

A. My conclusion was that there would be an adverse impact on the market for General Motors stock of 10 to 15 per cent.

Q. And how did you get that figure?

A. We got that figure through our own judgment primarily by going back and looking at all the other second-
[fol. 2412] aries, as we have recited before, looking at the Sloan secondary, which is only 67 per cent, two-thirds of this amount, where we found—although there seems to be some difference of opinion on that—about a 5 per cent, or a little less than 5 per cent impact.

Realizing that 55 per cent more stock every year with 18 million additional shares hanging over the market, we felt that the impact would be at least twice to three times as great as the impact on the Sloan secondary.

Q. And for your basic figure you used the 5 per cent which you relied on?

A. We relied on that only to some extent. We tied it in only for the sake of showing, with an actual demonstration of a block of stock in the same company, that an isolated trade has some effect.

We have no precedent for the succession of two million share offerings and our calculations may be far low in this respect. We know just through normal market conditions the stock of General Motors has dropped in 1957 from 47½ to around 33 and a fraction.

If one of these offerings came during such a period, the impact would be in excess of that 10 to 15 per cent.

Q. Now, you did rely, however, on the Sloan figure for your two to three times amount?

A. We said that it would be two to three times the adverse impact that we felt existed in the Sloan offering, but that is not our only judgment. Our only judgment comes down to the existence of our judgment on this particular block at two million shares a year.

Even if the Sloan secondary did not exist, our opinion still would be that it would be ten to fifteen per cent.

Q. Now, you also testified earlier that in your judgment [fol. 2413] the impact resulting from the Sloan offering lasted a period of a few days?

A. That appears to be so from the figures I have, yes.

Q. I believe that is what you said.

A. That is correct, I did. Yes.

Q. Now, relating that opinion to your opinion with respect to the Government's proposal, how long a period do you think the percentage you estimated would last?

A. Well, I think that the percentage would last during most of the 10-year period. During periods of market strength, I think the impact might be a little less than the ten to fifteen, and during periods of market weakness or unprofitable years in the automobile industry they might be substantially greater than those percentages.

Q. But you think at all times over the whole period it would average that?

A. On an average, that is my opinion, yes, sir.

The Court: The Court stands recessed for ten minutes.

(A short recess taken.)

The Court: Counsel may proceed.

By Mr. Reycraft:

Q. Mr. Lenz, are you familiar with the purchases by General Motors of its own stock on the New York Stock Exchange?

A. I am familiar with it, Mr. Reycraft. I am not familiar with all the details, but I am familiar with the purchases, yes, sir.

Q. Do you know approximately how much they purchase?

A. I understand it is about in the neighborhood of a million shares a year, in recent years.

[fol. 2414] Q. And do you know how much they purchased over the last ten or twelve years?

A. I haven't those figures in mind. I think there was an exhibit.

No, there was not. But I remember a figure of six million, six. However, I believe that was before the split-up, so I am not sure what the exact figure would be.

Q. I think you will find it around 14 million.

Mr. Horsky: On an adjusted basis?

Mr. Reycraft: Adjusted for one and two-thirds par value; I believe you will find it about 14 million.

By the Witness:

A. (Continuing) Yes, over twelve years. That would be a little over a million a year.

By Mr. Reycraft:

Q. Yes. Do you have an opinion, sir, as to the effect which purchases of this magnitude have had on the market price of General Motors?

A. Yes, I do, Mr. Reycraft.

Q. What is it?

A. May I have your question again, please?

Q. Do you have an opinion as to the effect on the market price of General Motors stock of the purchases we have referred to by General Motors Corporation?

A. I believe it has had primarily a stabilizing effect on the market for the stock, in that it is my understanding

that the company at no time bids up the price but usually sits at either the market price or a little bit below the market, and takes stock that comes in. This of course prevents the stock from going down as much as it otherwise would go down.

Q. It does, in your opinion, have an effect on the market price?

A. Yes, it does, a beneficial effect.

Q. Pardon me?

A. A beneficial effect.

[fol. 2415] Q. It makes the price higher?

A. That is correct.

Q. Which is beneficial from whose viewpoint?

A. Beneficial from the standpoint of the existing holders.

Q. Is it beneficial from the standpoint of the potential purchaser?

A. I don't think we have to worry about the purchaser. It is up to him to make up his own mind what price he wants to pay for the stock. We are not worried about it. The main benefit is to the existing holder. We don't like to drive things down to make them cheaper for a prospective buyer.

Q. But we don't mind driving them up?

A. I don't think we are driving it up. We are preventing it from going down. There is quite a difference there.

Q. I believe you have testified earlier that you base some of the opinions you have expressed on what one witness called the ancient and immutable law of supply and demand. Are you able to distinguish between the effects on market price of buying and selling?

A. In any given specific instance, Mr. Reycraft?

Q. In the specific instance of the purchase by General Motors Corporation of its own stock?

Mr. Horsky: It doesn't sell, Mr. Reycraft. Would you make the question clearer?

By Mr. Reycraft:

Q. I meant to say "purchase" if I didn't.

A. I am sorry, I didn't get the question.

Q. I will restate it.

You know that General Motors purchases its own stock?

A. Yes.

Q. In your judgment, is there any effect on the market [fol. 2416] price of General Motors in terms of dollar movement or percentage movement up or down from those purchases?

A. I think I testified that there was a stabilizing effect, which meant that the price was benefited as a result of the purchases preventing the stock from going down as much as it otherwise would. In other words, we have one million additional shares on the demand side, over the course of a year, and in any underwriting transaction any one that handles stabilization for bidding at or under the market knows that quite often when a seller comes in and finds a ready buyer at any time, he withdraws some of his sell order, so that the market is benefited to that extent. In other words, it prevents to some extent the market from going down.

Q. In your judgment, is the New York Stock Exchange an auction market?

A. Yes, it is.

Q. And can you define an "auction market"?

A. The place where willing buyers and sellers are brought together.

Q. And haggle over price, perhaps?

A. Haggle over price perhaps, frequently.

Q. And the buyer tries to pay less, and the seller tries to get more?

A. That is correct, yes, sir.

Q. Do you have any reason to think that the auction market aspect of the New York Stock Exchange is different for buyers than for sellers?

Mr. Horsky: I object on the ground of incomprehensibility, your Honor.

The Court: Sustained.

Mr. Horsky: It was sustained, wasn't it?

The Court: Yes.

Rephrase your question.

[fol. 2417] Mr. Reycraft: I thought it was quite clear, but I will try again.

The Court: Maybe it is clear to the witness, but I don't understand it.

Mr. Reycraft: All right, sir. I will try again.

By Mr. Reycraft:

Q. If a seller is selling stock on the New York Stock Exchange—let us make it General Motors shares—at a million shares a year, in your judgment would this have any effect on the market price of that stock?

A. Attempting to sell on the New York Stock Exchange a million shares a year?

Q. Yes. He is asking for bids.

A. Would it have an effect?

Q. Yes.

A. It would have an effect.

Q. Do you have an opinion as to how much?

A. It would have—and there again, would this selling be known, publicly known, as the General Motors purchases are known?

Q. It would be.

A. It would be known.

It would have quite an adverse effect on the market. I think the selling side has a greater effect than the buying side for the reason that fear psychology is a very tough thing to combat; and when you have got a big seller, people are worried as to why stock is being sold, whereas on the buying side, most of them like it, the existing shareholders like it; and on the sales side, if they see a lot overhanging and pressing, and coming into the market for sale consistently, the fear psychology is such that other people add [fol. 2418] their shares for sale to the existing orders and it snowballs.

Q. And do you think that General Motors purchases of a million or more shares a year has the same effect of attracting other purchasers?

A. They might undoubtedly attract some additional purchasers, but not nearly as much as would be the case on the sell side.

Q. But it is your opinion that the effect on the market from the buy side is not as great as the effect on the market from the sell side?

A. That is correct.

In the case of these very substantial amounts of stock, that is right.

In the first place, I don't think anybody would be stupid or foolish enough to attempt to sell on the floor of the New

York Stock Exchange such a large block of stock. I think we have testified or I have testified before that the only proper way of handling a block of that size and scope would be through a secondary distribution.

When and if such an order were on the floor of the Stock Exchange and it is known that the stock was hanging over the market and being sold, all the brokers on the floor pass that word along to their offices, and they are all worried as to why all this stock is for sale. The potential buyer pulls his bid out to wait to get advantage of the decline which will take place as a result of the pressure from this block, whereas on the buy side, everybody likes to look at the favorable side of things, primarily; and seeing a buyer may attract some other buyers. When the psychology is such that there is this million shares on the buy side, the other alternative is that some sellers may withdraw, seeing there is that large order to buy; they hope that the buyer will drive up the price of the stock. If he stays there in an [fol. 2419] orderly professional way to buy when it comes in, then you don't run the market up the same way as this negative effect would take place in the event of this large sale order.

Q. Well, now, if the buyer wants to buy a million shares a year, he has to find sellers of a million shares?

A. That is correct.

Q. Do you think that, from your general experience, sellers of stock are not aware of demand situations for stock?

A. Sellers of stock of such a demand, you mean, that there is this buying going on consistently?

Q. Yes.

A. I think a lot of them are not aware of it. I think a great many people are aware of it, but I think the average man would not be aware of that buying.

Q. Well, inasmuch as we are speaking of an auction market, does it make any difference whether the buyer is aware of the source of demand or not?

Mr. Horsky: May I have that question read?

I think you misspoke yourself.

(Question read.)

By Mr. Reycraft:

Q. I meant the seller.

A. Not if he wants to sell; but there is this advantage to the seller. If he knows it, if he knows that that demand is there, he is more liable to press stock for sale, generally.

Q. I am sorry, I didn't hear that answer.

A. I say if the seller is a man who wants to liquidate and he knows that buying is in the market, he would be more inclined to sell at that point.

Q. He would sell it for a lower price?

[fol. 2420] A. He would think he could get a better price if he fed it out, knowing there is this additional demand in the market.

Q. He would think he could get a better price?

A. He would think he could get a better price, that is correct.

Q. Do you conclude then that the purchases by General Motors of a million or more shares a year of its own stock would have any effect on the market price upward, that is, other than a mere stabilizing?

A. It would have a beneficial effect.

Mr. Horsky: I think we have been over this four times, your Honor.

By the Witness:

A. (Continuing) I don't say that it has an effect upward, Mr. Reycraft; it has an effect of preventing it from going down, which in effect gets your desired result at a later date. It keeps it at a higher level than it otherwise would have sold at.

By Mr. Reycraft:

Q. It sells for more than it would have?

A. That is correct, yes, sir. Definitely.

Q. Do you have an opinion as to how much?

A. I haven't studied the impact with that in mind, and I wouldn't be able to guess; but I would say several points.

Q. Now if that volume should be increased double, let us say, in your judgment, would it double the impact?

Mr. Horsky: Are you speaking of purchasing?

By Mr. Reycraft:

Q. Purchasing of two million rather than one million?

A. It might more than double the impact.

[fol. 2421] Q. Because of the scarcity of stock available for sale?

A. Because you wouldn't anticipate, necessarily, an increase in the supply of stock for sale. Actually, the supply might be less, because knowing that they were going to buy two million instead of one, some sellers, I think, would withdraw offerings.

Q. They would wait for the price to go up?

A. That is right. In other words, the impact might be much more than twice as great. Let us put it that way.

Q. I believe you testified earlier that in general, referring to the figures which appear in the exhibit which I handed you, that it was more difficult to buy a fixed amount of stock or took a longer time than to sell a like amount of stock?

A. That is correct, Mr. Reycraft.

Q. Would it follow logically that there might be a greater impact on the market price of a stock emanating from buying a fixed amount and from selling a fixed amount at a given time?

A. A greater impact? No, I think I testified to the contrary that there would be a greater impact from selling that kind of an amount of stock than there would be from the purchase.

Now, I might also say this: We were assuming, in all cases of buying and selling by professional people, that they know their business and they know how to go about it. You can butcher the market on either side by not doing it properly; and from what I have discovered, the General Motors Company knows how to handle the purchases of this million shares plus, without disturbing the market, except for a very small amount; and I don't say it is actually—"disturbance" is probably a wrong word—without having anything but a slight impact on the market.

[fol. 2422] Q. A few points?

A. Yes.

Q. How do they do this?

A. Well, I would like to have all the details as to how they do it, but I frankly don't.

I assume that—well, I believe they apportion up the amount of stock that they have for purchase, and by fairly regularized amounts over a period of either weeks or months—and I assume that the amounts might vary depending on the market conditions—I would believe that—I understand more or less that they do it in a way that they wait for the stock to come to them; they do it with a bid either at the market or slightly below the market, so that if a seller hits them, then they make the purchase. In that way, it provides a more stable market; but it does not, conversely, have such an upward effect on the market as it could if they bid aggressively and went and raised their bid beyond the existing last sale.

Q. Well, buying a million shares a year, if they wanted to run the price up, I suppose they could do it, if they set out to.

A. They certainly could.

Q. If they do it intelligently, wisely?

A. That is my understanding, yes, sir.

Q. And do they do it through brokers?

A. I believe they do. I am not certain who handles the orders. We would like to have some of them.

Q. Is there more than one broker involved?

A. That I don't know. My assumption is that it is handled by one firm. I would think it would be, or if it isn't, it is probably divided in such a way that one man does it one time, and another firm at another time because only through one man or one firm can the purchases be properly coordinated.

[fol. 2423] Q. And they would have to be coordinated in your judgment?

A. They would have to be coordinated very definitely, Mr. Reycraft, yes, sir.

Q. Now, did you anticipate in forming your opinion with respect to the various consequences you have testified would result in the varying assumptions which Mr. Horsky gave you, that sales would be made by a seller appearing on the floor of the New York Stock Exchange with a prospectus or what assumptions did you make as to the management of that?

A. Of the sale of the trustee stock or for the——

Q. The trustee stock.

A. The trustee stock? My assumptions hold, whether or not registration is necessary as far as sales of the two million shares by the trustee per annum is concerned.

I think there is very little differential in this particular instance between a non-registered secondary of two million shares or a registered secondary.

It is known that the two million shares is to be sold and will be sold annually or deferred, perhaps, once in a while, so that people are aware of the fact the stock is coming to market.

There might be a slight difference in the fact that there is a little greater risk as far as the trustee is concerned by having to wait during the registration period.

The difference, I think, Mr. Reycraft, would be primarily this: That if the stock had to be registered and the registration was not done at the time that the distributions were made to the individual shareholders of du Pont, those individuals might rush into the market and beat the market down before the trustee could come to market.

[fol. 2424] Q. Well, did you make any fixed assumption as to the manner of marketing?

Mr. Horsky: Of the trustee's shares? Are we still talking about that?

By Mr. Reycraft:

Q. Let's talk about the trustee shares.

A. I didn't get that, I am sorry.

Q. Did you have any fixed assumption as to whether it would be registered or unregistered?

A. I have no fixed assumption. I presume, from my experience in the business, that there would have to be registration, but I didn't know that for a certainty. That would be something, I think, that would have to be determined quite carefully.

Q. Do you think it would make a difference?

A. It might make a difference only in this respect of the fact of registration that during the period of registration, while the trustee was having to wait, that the distributees would press the market down, and the trustee, through registration, therefore, might get a lesser price than if he was able to go ahead right away.

Q. Does it make any difference in your percentages if it were registered or unregistered?

A. I used the range specifically for that purpose to take care—I think there would be a variation between these figures that we mentioned here, the 20 to 30 per cent. There might be some lesser percentage within that range if registration was not necessary than if registration were necessary.

What I am saying to you is that if registration were necessary, the market impact from an adverse standpoint [fol. 2425] would be toward the upper end of that range, whereas if it were not, it might be about somewhat lower, maybe 4 or 5 percentage points. I couldn't determine that.

That would also depend on what happened during the registration period, and that I cannot forecast.

Q. It depends on a lot of things?

A. Yes, sir.

Q. Which you don't know?

A. That is right.

Q. Do you have an opinion, sir, as to how much General Motors stock the du Pont Company could sell within the next few weeks if it chose to do so?

Mr. Horsky: I object, your Honor. I think it is irrelevant.

The Court: What is the relevancy of this, Counsel?

Mr. Reycraft: The relevancy of it is, your Honor, that it seems to me that any sale by the du Pont Company of General Motors stock is relevant to this inquiry.

The Court: This case won't be over in three weeks, will it?

Mr. Reycraft: They might have sold it all by the time it is, your Honor.

The Court: Well, you don't have to wait for the results. I sustain the objection.

By Mr. Reycraft:

Q. Can you tell me, Mr. Lenz, what the limitations were on your study in connection with your testimony in this case?

A. Specifically, Mr. Reycraft, I would like to get exactly what you are driving at. What my assumptions were?

Q. No, sir. If you were given any instructions as to what [fol. 2426] you should limit your study to, whether you did in fact limit your study to particular aspects of the case or just what——

A. I limited, we limited, the people that are working with me, limited our study to the Government's proposal with the certain variations that were mentioned in this summary presented by the Government, and certain other variations which arose as a result of the hearing.

Q. You are experienced as an underwriter, are you not?

A. That is correct.

Q. Were you asked to consider any alternative method by which this divestiture could be accomplished?

A. No, I was not.

Q. And you did not, in fact, engage in any such studies?

A. You mean a completely new plan?

Q. Yes.

A. No. No, we were asked to testify as a witness with respect to the Government's proposal.

Q. And to limit your study to the proposal which is on file?

A. With the obvious variations previously mentioned.

Q. Now, you have given some testimony, sir, concerning the recent A & P secondary, and I wonder if you can tell me how many shares were involved in that issue?

A. 1,800,000 shares.

Q. Do you know what the selling price was?

A. $44.50.

Q. Who managed that issue?

A. It is managed by four firms: Smith Barney, Morgan Stanley, Loeb Rhodes, and Kuhn Loeb.

Q. Did your firm participate in the underwriting?

A. We did.

Q. Do you know how long it took to sell that stock? [fol. 2427] A. How long it took to sell that stock? I think these times that are used on how long it took to sell stock are rather misleading.

Actually, in the case of A&P, or any issue of that type, the sales effort begins in effect many weeks before the offering. We build up over a period of time during the registration period indications of interest from various

buyers and through our various offices so that the machinery is all set up over that period of time.

It is really a continuing effort, so that when they say that it was sold in an hour, that is only after several weeks' previous effort.

Q. But your salesmen don't get on the phone until the price is fixed, do they?

A. They are talking to customers all the time, every day, and the customer says to them, now, when A&P comes along, I have an interest.

They know that this man has an interest, and that he may have an interest, roughly, of a certain size, what that size may be. They merely then get on the telephone when it is officially released, and get that man nailed down for the amount of stock he is interested in at the specific price, if he still wants to buy it.

Q. So that the foreknowledge that there will be an issue is an advantage in that case?

A. That is correct.

Q. You testified, I believe, that A&P sold at a high of 59 after the initial offering?

A. Yes—no, it sold at a high of 59 after listing on the New York Stock Exchange on December 15, 1958, which is right after the 10 for 1 split of the stock.

Q. And this was the first listing of the A&P stock?

A. No, A&P was listed on the American Stock Exchange prior to that time, but that was a very, very limited scarce [fol. 2428] market in that—I can't remember any percentages, but my recollection is that 90 some odd per cent of the stock was owned by the Hartford Foundation and various members of the Hartford family.

Q. How much of the A&P stock is now owned by members of the family?

A. Well, it is still the bulk of the stock. I can't recall the exact percentage.

Q. Do you anticipate as a person familiar with the market that this stock would be sold?

A. Yes, I do.

Q. Within what period of time?

A. Well, as I said before, I think it will be sold within a very short period of time, from the actual time that the selling officially begins legally, but actually the efforts in

building up the interest started much before that period of time.

Mr. Horsky: May I suggest that the witness was confused, and you should straighten that out.

Mr. Reycraft: I intend to.

By Mr. Reycraft:

Q. I had reference, Mr. Lenz, to the A&P stock which is now held by the family, which has not yet been sold.

A. Oh, I beg your pardon. May I have the question again?

Q. Yes; do you have an opinion as to whether that stock will also be coming on the market?

A. Oh, I answered the question improperly. I assume that at some unknown later date there will be some sales, additional sales by members of the family. There is none indicated at the present time.

Q. Do you know how much A&P stock is now held by members of the family?

A. I do not know that percentage. I know the bulk of all the stock is still held by—the Foundation itself, I remem- [fol. 2429] ber, owned 40 per cent of the stock. The individuals, I cannot give you that figure, but I know the Foundation alone owns that amount.

Q. Do you know what the total equity of the A&P is now?

Mr. Horsky: May I have that question?

(Question read.)

By Mr. Reycraft:

Q. The number of shares outstanding?

A. The number of shares? No, I do not know the exact number of shares. I have not got that figure in mind.

Q. Now, you have testified, Mr. Lenz, that in the event the Court orders divestiture in this case, that your firm would issue a recommendation to its customers to sell General Motors stock.

A. I stated, I believe, that we would first prepare a carefully documented memorandum citing all the facts pertaining to the Government's proposal and the indicated effects, as we saw them, and that the customers would be able

to make up their minds from that, what action they would like to take with reference to their holdings.

Then, if the customer asked us what our opinion would be, we would tell him that we thought he should sell the stock unless he could withstand a prolonged price decline without any qualms on his part, and most people do not like to lose money, or lose part of their profits, so my presumption is that most of them would undoubtedly sell their stock.

Q. Has it been your experience that recommendations which your firm makes to its customers generally or frequently have an effect on the market price of the stock [fol. 2430] involved?

A. Yes.

Q. In other words, if your firm thinks it is a good buy, why, that will generate demand, and if your firm recommends that it is not a good buy, why, it will result in a decrease in the market price?

A. We are aware of any possible impact and we try to work it out so that there is no undue disturbance to the market either way, and we have set up certain procedure to prevent any detrimental impact either way, one way or the other, but——

Q. As a matter of fact——

A. (Continuing) But it does bring in buying if the recommendation were a specific purchase and it does bring in selling if it is a specific sell recommendation.

Q. So that whether you are right or wrong, your recommendation would be likely to have some effect on the market price?

A. That probably would be true, but if we were wrong too often it would not have any effect whatsoever.

Q. Did you assume in making the percentage estimates which you made that the selling by the trustee would be a series of secondaries?

A. Yes, I did.

Q. You did?

A. Yes.

Q. Can you tell me how you distinguish between the various percentages which you arrived at?

A. How I distinguish between them?

Q. Yes, sir.

Mr. Horsky: I think the question is unclear, your Honor. I suggest counsel rephrase it.

Mr. Reycraft: Well, I will explain it.

[fol. 2431] By Mr. Reycraft:

Q. How do you—take any one of them and tell me how you got it.

A. Well, I think I testified as to the overall impact on General Motors of 20 to 30 per cent just a little while ago.

Q. You testified that in your opinion there would be such an impact.

A. That is correct.

Q. I do not recall your testifying how you got the 20 to 30 per cent.

Mr. Horsky: Well, I think he did, your Honor.

The Witness: Yes, I did.

Mr. Horsky: I suggest this is pure repetition. We went over it for about ten minutes.

The Court: I think it has been covered.

By Mr. Reycraft:

Q. Can you tell me what part of that percentage you attribute to the trustee's sales?

A. Yes. I think that is fairly obvious, that if we separate the two things that we are saying that half of the impact is due to the trustee's sales. I mentioned the 10 to 15 per cent figure for the adverse effect of the trustee's sale prior to this in one of your previous questions. We assumed that the stock would be distributed without any tax.

Q. You got the 10-15 by reference to the Sloan secondary?

A. That is correct; that is correct.

Mr. Reycraft: That is all.

Mr. Horsky: I have one question.

Redirect Examination.

By Mr. Horsky:

Q. Did you have an opportunity during the recess to look again at Government Exhibit 541, this big sheet?

A. Yes, I did.

[fols. 2432-2433] Q. You testified in answer to a question by Mr. Reycraft that these were all secondary issues. Would you like to correct that answer?

A. That answer should be corrected in that there are a number of those offerings in there which I have subsequently spotted that are primary offerings.

Q. Would you indicate a few of them?

A. Public Service Electric and Gas Company, for example; American Heritage Life Insurance Company; Upjohn —no, Upjohn, I guess we could classify that as a secondary, although it was a registered secondary. There are a number of others.

Mr. Horsky: That is all.

The Court: Any other questions? All right, you are excused.

(Witness excused.)

The Court: The Court stands adjourned as far as this case is concerned until Monday at ten o'clock.

(Whereupon an adjournment was taken in the trial of the above-entitled cause until Monday, March 30, 1959, at 10:00 o'clock, a.m.)

[fol. 2434]

Transcript of Proceedings in March 30, 1959

The Court: Proceed, please.

Mr. Tierney: Good morning, your Honor. At this time General Motors will call as a witness David M. Kennedy.

David M. Kennedy, a witness called on behalf of General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Tierney:

Q. Will you give the reporter your name, please?

A. David M. Kennedy, 323 Ashland Avenue, Evanston, Illinois.

Q. What is your occupation, Mr. Kennedy?

A. I am Chairman of the Board of Directors of the Continental Illinois Bank & Trust Company of Chicago.

Q. What has been your formal education?

A. I graduated from Weber College, Ogden, Utah, in 1928. I graduated from George Washington University, Washington, D. C., in 1937, and received my law degree, LLB, in 1939, from George Washington.

I also graduated from the Graduate School of Banking of the American Institute of Banking, Rutgers University, I think in 1939.

Q. What degrees do you have?

A. I have my academic degrees, plus the LLB degree.

Q. Now what have been your positions with the Continental Illinois National Bank & Trust Company? And I am going to speak of it as the "Continental Bank."

What have been your positions with the Continental Bank?

A. I joined the Continental Bank in October of 1946 and was in the Bond Department until the Fall of 1953. In that period I was assistant in the management of the department, which included the bank's investments, the [fol. 2435] United States Government securities, state and municipal securities, and corporate obligations, with a portfolio in that period, most of the period, amounting to somewhat over a billion dollars; and also in the management of our Government Bond Trading Department, in which we are a large dealer in United States Government securities and in the underwriting distribution of municipal securities.

Q. In 1953——

A. Well, I resigned from the bank in the Fall of 1953, and then came back to the bank in the latter part of 1954, in December; and then I succeeded to be head of the Bond Department upon the retirement of Mr. F. M. Knight.

In November of 1956, I was elected a Director of the bank, and President, and then early this year I was elected Chairman of the Board of Directors and Chief Executive Officer of the bank.

Q. What has been your other business experience, Mr. Kennedy?

A. In the period from 1930 through the depression years, and through the war years, to 1946, when I joined the

Continental Bank, I was with the Board of Governors of the Federal Reserve System. In that organization, I was technical assistant in the Division of Bank Operations; I was economist in the Division of Research and Statistics; I was Assistant to the Chairman of the Board of Governors of the Federal Reserve System with primary responsibility in the fields of open market operations, the money market, and in acting in liaison with the United States Treasury Department in war financing.

Then in the period of 1953, in the Fall and to 1954, I was at the United States Treasury Department as Assis- [fol. 2436] tant to the Secretary of the Treasury, with responsibility largely in the field of debt management and treasury financing operations.

Q. Are you affiliated with any other corporations?

A. Yes. I serve as a Director of the Abbott Laboratories, and as a Director of the International Harvester Corporation; as a Trustee of the Equitable Life Insurance Company of Des Moines, Iowa.

Q. What have been your activities in civic and charitable and educational work?

A. Many and varied. I am a Trustee of the University of Chicago; I am a Trustee of Presbyterian-St. Luke's Hospital; a Director of the Chicago Central Area Committee; a Director of the Chicago Association of Commerce and Industry; Public Advisor for the Midwest Stock Exchange; and a few others that I don't recall.

Q. Have you had any experience in teaching in the banking field?

A. Yes, I have lectured, and been on the faculty at a number of the universities throughout the country. The principal ones would be on the faculty of the Central States School of Banking at the University of Wisconsin, Madison, Wisconsin; School of Banking of the South, at Louisiana State University, Baton Rouge, Louisiana; and at the Graduate School of Banking at Rutgers University.

Q. Have you been active in banking associations or associations dealing with the banking profession?

A. Yes, serving in various capacities with the American Bankers' Association in committee work, as a member of the Government Borrowing Committee of the American Bankers' Association, which advises with the Treasury on [fol. 2437] problems of financing and debt management;

formerly such an assignment with the Investment Bankers' Association of America, and in some of the learned societies, American Finance Association, one period of a few years I served as vice president in their investment department.

Q. Now, returning to the Continental Bank, what are your activities in connection with the Trust Department of the Continental Bank?

A. Well, I am a member of the Directors' Committee of the Trust Department and now, of course, I am Chairman of that Committee.

Q. What is the function of that Director's Committee?

A. That Committee supervises generally the operations of the Trust Department and reviews the investment policies of the Trust Department.

Q. Mr. Kennedy, are you familiar with the plan which the Government has proposed in this case?

A. I am.

Q. Are you also familiar with the tax ruling of the Internal Revenue Service involved in this case?

A. I believe I am, yes.

Q. In your opinion, would the adoption of the Government plan have an effect on the market price of General Motors stock?

Mr. Owens: If your Honor please, we would like at this point to ascertain whether Mr. Tierney is qualifying this witness as an expert on security analysis or market analysis.

Mr. Tierney: I am very happy to explain that to counsel and your Honor at this time.

We are presenting this witness as the chief executive officer of a very large bank which has very large assets in its Trust Department and in its pension trusts.

[fol. 2438] This witness will testify as a banker who is compelled to make decisions in view of this Government plan, and he will give the Court his opinion as to what he will do under those circumstances and why.

Now, whether he is a market analyst or not, we are not presenting him here as a market analyst. We are presenting him here as a man who has to make decisions and a man who will make decisions which will involve those people

concerning which your Honor had some concern when this case was opened, the people that are involved in trusts.

The Court: Does that answer your question?

Mr. Owens: Well, your Honor, we don't think that his answers are competent on the question of the probable market consequences of the Government's proposed plan of divestiture in the absence of some special qualification in that respect.

Now, I think with respect to the testimony we have had previously of a witness in a similar capacity it was indicated that they operate largely on the basis of recommendations made by people that are skilled in that particular field.

If that is the case, I think that we should have those people come and testify and not someone here who is going to act on the hearsay, what is to him the hearsay studies of other people who, although they may be located in his bank and under his jurisdiction, they are the experts and not this gentleman.

I can understand that if they say that in their opinion certain depressive effects will occur, that then he might be able to testify as to what he would do. But [fol. 2439] we think that the investment analysts, the security analysts, and the market analysts, are the ones who should properly be required to be called and to testify with respect to these matters, your Honor.

It appears to me that his testimony would be on the basis of hearsay.

The Court: Do you wish to reply Mr. Tierney?

Mr. Tierney: No, I have asked a question.

The Court: If this is an objection, it is overruled. I think he is competent to express an opinion as to what he would do. We haven't heard his testimony yet.

Mr. Owens: I take it, then, the question as to what he will do will have to be based on certain assumptions as to what is recommended to him by his subordinates.

The Court: If you have any objections after he makes his answer, I will hear you.

Mr. Owens: Thank you, your Honor.

Mr. Tierney: As I understood your answer, you said——

The Witness: What is your question, Mr. Tierney?

By Mr. Tierney:

Q. I said in your opinion, would the adoption of the Government plan have an effect on the market price of General Motors stock? I understand that you answered it yes.

A. No. My opinion is that it would seriously depress the price of General Motors stock.

Q. When would that impact occur, in your opinion?

Mr. Owens: If your Honor please, I think he is clearly testifying here on the basis of his expert opinion, and he is not established as an expert.

The Court: The objection is overruled.

[fol. 2440] By the Witness:

A. The impact would occur at the time the Government plan were adopted and announced.

By Mr. Tierney:

Q. And how long would that depressing effect on the market last, in your opinion?

A. Well, it would be a long lasting effect. It is a ten year plan.

Q. What would happen if one or more of the trustee's annual sales proved to be unsuccessful?

A. Well, if in the annual sales they had an issue that was unsuccessful, it would further intensify the depression in price of the General Motors stock.

Mr. Owens: Your Honor, he is not testifying as to what he would do. He is testifying as to what he thinks would happen if there were deferment of the trustee sales in any particular year.

The Court: I think by reason of his experience he is competent to express an opinion. Overruled.

By Mr. Tierney:

Q. Mr. Kennedy, has General Motors stock been attractive to investors, in your opinion?

A. Yes, it has.

Q. And for what reason?

A. Well, General Motors is the largest in the automobile

manufacturing industry. It has good management. I would say excellent management. It has increased its sales over the years to more than fifty per cent of the industry total. It is a well diversified company. It is in other fields, such as the leading producer of diesels, or buses, refrigerators, and other products. It is a good investment.

Q. What is the market attitude of investors toward the [fol. 2441] growth prospects of General Motors?

A. Well, many investors feel that General Motors stock is now mature stock with little or only reasonable prospects of future growth except as it shares in the growth of the national economy.

I would not expect that General Motors could achieve the measure of performance that they have in the period since the war, because there you had a period of a heavy backlog of demand by the public for automobiles and the other products that General Motors produces, and they were able to take care of a market that was crying for automobiles.

Q. What is the attitude of the Continental Bank as a potential investor in General Motors stock?

Mr. Owens: If your Honor please, he is testifying to the attitude of several other people or a composite attitude of a group of people with whom he is associated now.

The Court: You will have a chance to cross examine him, counsel. Objection overruled.

Read the question, please.

(Question read.)

By the Witness:

A. Well, the Continental Bank as an investor of trust assets seeks investment with good possibility of capital appreciation.

Now, if you add the depressing effects of this Government plan to the other factors affecting General Motors as an investor, we would sit on the sidelines and wait to see, so to speak, what the effect would be.

Q. Under what circumstances would the Continental [fol. 2442] Bank invest in General Motors stock if the Government plan were adopted?

A. Well, assuming the adoption of the Government plan, we would consider investing in General Motors stock only as an income-producing security.

Q. On what basis would General Motors stock be attractive as an income-producing security, assuming the adoption of the Government plan?

A. Well, General Motors, assuming that, would have to decline in price to where it would reach a bargain basis. Now, by "bargain basis," I would mean a price at which it would yield 6 per cent or more. That is, assuming that other alternative outlets for investments in the market would continue to provide the investment prospects as about presently available in that market.

Q. And assuming the present dividend of $2.00 and a yield of 6 per cent, that price would be what?

A. Well, if you assume that General Motors should continue and did continue to pay a $2.00 dividend, that 6 per cent yield would calculate out at a price of $33.00 per share, approximately.

Q. Might the bank defer its purchases of General Motors stock even if the price of the stock fell to $33.00 per share?

A. Yes, we might well defer our purchasing, waiting to see what the actual effect of these annual sales of this General Motors stock would be in the market.

We are not required to purchase General Motors stock. We have other alternative outlets for our money, and we could take refuge for temporary or longer periods as might be necessary in Treasury bills or other obligations, or we can seek other investment outlets in the market.

Q. Would the policy that you have just expressed be applicable to pension trusts as well?

A. Very definitely.

[fol. 2443] Q. Now, how many pension trusts does your bank have, if you know?

A. I don't really know the number. I know that it would be in excess of a hundred, because we have holdings of General Motors stock in approximately a hundred of the pension and profit-sharing trusts that we administer.

Q. Does the fact that du Pont has large holdings of General Motors stock make du Pont an attractive investment in your opinion?

A. It does, because in purchasing du Pont stock, we

obtain an interest in a company that has leadership in a growth field, and indirectly we obtain through their holdings of General Motors an interest in General Motors which is a leader in the automobile industry.

Q. Did the Continental Bank purchase du Pont stock for the benefit of income beneficiaries as well as remaindermen?

A. Yes, we purchased that stock for both the income beneficiaries and the remaindermen.

Q. What benefits were contemplated for the life tenants or income beneficiaries?

A. We would pay, of course, to the income beneficiaries and life tenants the dividend that we received from du Pont. That would reflect their earnings in the chemical business, and it would reflect their receipt of dividends from the General Motors through their ownership of stock in General Motors.

Q. And what benefits were contemplated in the purchase of du Pont stock to the remaindermen?

A. Well, in the case of the remaindermen, we would turn over to them a stock at the end of the life tenancy, du Pont stock, which again would reflect the value of the assets in the chemical business and their ownership of General Motors stock.

Q. What would be the effect of the Government plan on [fol. 2444] the purpose of the Bank's investment in du Pont stock?

A. The adoption of that plan would completely frustrate our basic attempt and purpose in investment in du Pont stock; completely frustrate it.

Q. Is the proposed distribution of the du Pont holdings of General Motors' stock a return of capital?

A. Yes, rightfully it would be a return of a part of the capital invested in du Pont through du Pont's ownership of General Motors stock.

Q. And to whom does that return of capital belong?

A. A return of capital would belong to the remaindermen on the termination, of course, of the life tenancy.

Q. Now, according to the Internal Revenue Bureau ruling, how would the distribution be treated for tax purposes?

A. It is my understanding that Internal Revenue Service has ruled that this distribution would be considered an

ordinary dividend and subject to the ordinary income tax rates.

Q. Mr. Kennedy, what percentage of the bank's fiduciary holdings of du Pont stock are subject to tax consequences of the Government plan?

A. Well, more than 80 per cent of our fiduciary holdings of du Pont stock would be subject to the tax consequences of the distribution.

Q. Now, assume, if you will, that the distributions of General Motors stock under the Government plan were to go to the current income beneficiary. Would some of that stock be sold to pay taxes?

A. Oh, yes. It goes without saying that if that stock were distributed and would be subject to the tax, that a good deal of it would have to be sold in order to raise funds with which to pay the tax on the distribution.

[fol. 2445] Q. Well, why should the income beneficiaries sell their General Motors holdings instead of selling other securities?

A. Well, we would sell General Motors because that is the stock that we would be receiving. It would fix the price of that stock. We would know what we had to sell. Then there would be another factor, if we should choose another stock, we would have the problem of capital gains and cost value on our books for the stock we might select.

Preponderantly, we would sell General Motors stock.

Q. Well, what injustice to remaindermen would result from the adoption of the Government plan?

A. Well, assuming the Government plan, if the distribution should go to the income beneficiaries, the remaindermen would be deprived of the value of the General Motors stock that was included in the purchase price of every share of du Pont that we purchased for them.

Q. Would the adoption of the Government plan create problems of allocation between principal and income?

A. My lawyers tell me that it would create serious problems of allocation.

Mr. Owens: He is testifying now as to what somebody else told him and what the problems they said would be. If he wants to call a lawyer to testify to the problems, that is one thing. I think this is clearly——

The Court: Well, he has not stated the conversation. I think the conclusion may stand.

Mr. Owens: Pardon?

The Court: I say, he has not testified as to the conversation except the conclusion. It may stand.

Mr. Owens: He is testifying as to a conclusion of the lawyer now.

The Court: That is correct.

[fol. 2446] Mr. Tierney: He has to operate a trust department, your Honor.

Mr. Owens: But we have no opportunity to cross examine him with respect to what the lawyers' basis was. We are being deprived clearly of our right to cross examine.

By Mr. Tierney:

Q. Now, Mr. Kennedy, you said that this adoption of the plan would result in allocation problems. What policy has the Continental Bank adopted toward investments in du Pont stock since the Supreme Court decision in this case, June 3rd, 1957?

A. Well, since that Supreme Court decision in June of '57 we adopted a strict policy of not purchasing du Pont stock in any trust account where there would be the likelihood of a serious problem of allocation.

Q. And if the Government plan should be adopted, how would the bank as the trustee determine the proper method of allocation to be used for trusts holding du Pont stock?

A. Well, we, acting as a prudent trustee, would seek the instructions of the court as to the proper method of allocation.

Q. And why would you do that?

A. Well, our attorneys have told me that the trust instruments, the documents themselves, varied as they are, and the statutory laws, the applicable cases, do not specify the method of allocation in distributions of this kind.

Q. And you as the chief executive officer of the trust department, do you expect this would cause considerable litigation?

A. I do. There are so many cases where there are substantial values involved in the du Pont stock that is held [fol. 2447] and the distribution in General Motors would be very heavy.

Q. And is such litigation ordinarily protracted?

A. It is, because the court decisions necessarily vary in these cases, and you would have the litigants appealing in order to get a more favorable result. That is always protracted and hostile.

Mr. Owens: Your Honor, may we have a standing objection to all this testimony as to what the lawyers told him and what he thinks the legal problems are?

The Court: You may.

By Mr. Tierney:

Q. You have referred to the bank's policy toward investments in du Pont stock in recent years. Have you prepared a study of the bank's purchases and sales of du Pont stock since 1956?

A. I have.

Mr. Tierney: Will you mark this as General Motors' Exhibit No. 12?

(Thereupon said document was marked General Motors Exhibit No. 12, for identification.)

By Mr. Tierney:

Q. Was this document prepared by you?

A. It was.

Q. Exhibit No. 12 for identification?

A. Yes.

Q. And what does this document generally disclose?

A. It discloses the purchases and sales made by the Continental Bank of du Pont common stock in the period beginning January 1, '56, through February 19, 1959.

Q. And is this document based upon information contained in the records of the Continental Bank?

A. It is.

[fol. 2448] Q. State the number of shares of du Pont stock purchased and sold by the bank during 1956 and 1957 up to the Supreme Court decision on June 3rd?

A. Well, in the year '56, we purchased 3,406 shares of du Pont, and sold 577 shares.

From January 1, '57 to June 3, 1957, we purchased 601 shares and sold 360 shares.

The total in the period from the beginning of 1956 through June 3, '57, amounted to 4,007 purchased, against 937 shares sold. To net that out, it would be 3,070 shares net purchases.

Q. Now, refer to the period June 4th to December 31, 1957, and explain the exhibit, if you will?

A. From June 4, '57 to the end of the year '57, we purchased 1,090 shares and sold 1,500. In 1958 and to February 19, 1959, we purchased 433 shares and sold 16,738 shares. In that period since the decision, we purchased 1,523 shares and sold 18,238 shares. Netting that out would be net sales in the period of 16,715 shares.

Q. Why have you been sellers of du Pont in 1958 and 1959?

A. Well, when the Government plan was filed we decided that we would sell du Pont stock to the extent possible in those cases where we felt there would be a serious problem of allocation between principal and income.

Mr. Tierney: General Motors offers in evidence Exhibit No. 12.

Mr. Owens: If your Honor please, we would like to have some of the work papers in connection with this, such as would show on a monthly basis when these sales and when these purchases took place. This covers a period before the filing of the Government's plan.

It is hard to tell without having any work papers the extent to which it is based on the Government's plan. It [fol. 2449] starts with June 4, 1957, which I believe is the date of the Supreme Court decision, or the day before.

The Court: Well, is this document made up under your supervision or under your direction?

The Witness: It was, sir, and the purpose for pulling out that '58, as we did, was to show that in the period from June 4, 1957 to December 31, '57, we were about even with a net sale of only a moderate amount; but in the later period, as we got to studying this thing and considering it more and more, we determined to sell du Pont in those cases where we thought there would be an allocation problem presented. The figures speak for themselves that the sales jumped up substantially.

The Court: Well, I think it is admissible. The objection is overruled.

(Said document, so offered and received in evidence, was marked General Motors Exhibit No. 12.)

By Mr. Tierney:

Q. Mr. Kennedy, would any problem or dilemma be created if you wait to sell your du Pont until you found out for sure whether the Court will adopt the Government plan?

A. Well, Mr. Tierney, if we should wait until the plan were adopted, it would be too late, because if the income beneficiaries were entitled to the distributions and we should sell du Pont stock then, we would be taking away the rights of the income beneficiaries to receive future distributions of the General Motors stock under the plan.

[fol. 2450] And, on the other hand, if we hold onto the stock in this period we would be paying over to the income beneficiaries the distributions made of the General Motors stock, and the remaindermen would be depleted of the distributions made up to the end of the plan.

You see, we are on the horns of a dilemma in that matter—it is sort of be damned if we do, and be damned if we don't.

Q. Have you been able to meet that problem by selling du Pont for all trusts where there was an allocation problem?

A. No, we have not. For example, in those cases—there are many cases where we have the du Pont stock on the books at such a low figure for the trusts, that to sell the stock would be depleting the principal of the trust. We would be giving up the tax, you see, and the capital gains tax we would have to pay.

Q. Now, Mr. Kennedy, if the Government plan were adopted, are trustees likely to be potential purchasers or du Pont stock?

A. No, I would say no, because if we took a portion of trust principal to purchase an asset, which would be General Motors stock owned by du Pont, we would be taking that value and we would be then in the distributions, giving it to the income beneficiaries, and the remaindermen would have a loss of the value of the General Motors stock that was distributed to the income beneficiaries.

Q. Mr. Kennedy, have you prepared a study of the holdings of General Motors and du Pont stock?

A. Our holdings of that stock? Yes.

Q. How many shares of General Motors stock do you hold?

A. As of about the end of January, 1959, we held 845,323 [fol. 2451] shares of General Motors common stock in trust accounts.

Q. And what is the value of that stock?

A. The market value of those holdings, calculated as of March 3, at $46 per share, figures out to $38,884,858.

Q. How many accounts hold General Motors stock?

A. General Motors stock is held in trust accounts, numbering 1,221.

Q. How many shares of du Pont stock do you hold?

A. As of about the end of January, again in 1959, we held 105,855 shares of du Pont common stock.

Q. And what is the market value of that stock?

A. Again calculated as of March 3, 1959, at $217 a share, the market value would be $22,970,535.

Q. How many accounts hold du Pont stock?

A. 635 accounts.

Q. In what capacity is the General Motors and du Pont stock held?

A. It is all held in fiduciary capacity.

Q. Mr. Kennedy, have you made a computation or have you had made a computation of the tax impact of the Government plan on fiduciary accounts of the bank?

A. Yes, I have.

Mr. Tierney: Will the reporter please mark this document as General Motors Exhibit 13, for identification?

(Thereupon said document was marked General Motors Exhibit 13, for identification.)

By Mr. Tierney:

Q. Is that the document you referred to, Mr. Kennedy, General Motors Exhibit 13, for identification?

A. That is the document.

[fol. 2452] Q. What tax rate was applied in making this computation?

A. We used three tax rates, 50, 55, and 60 per cent.

Q. How were those tax rates selected?

A. We made a survey of a large number of accounts holding the stock. In the time available we were not able to get an over-all average effective rate, but it was apparent to me that the range would fall within 50 to 60 per cent range, with maybe a little more; and in order to give a conservative idea of the tax impact on these accounts, we have had this calculation made.

Q. Mr. Kennedy, assuming, as you have testified—assuming a drop in the price of General Motors stock from $46.00 to $39.00 a share, what would be the estimated tax liability of the fiduciary accounts of the Continental Bank under the Government's plan based upon those three rates?

A. Well, if we assumed that the market decline were only 15 per cent, the estimated tax at 50 per cent of our holdings of a total value of $4,711,000.00 would calculate to $2,356,000.00; at 55 per cent, it would be $2,591,000.00; and at 60 per cent, $2,827,000.00.

Mr. Tierney: General Motors offers in evidence Exhibit No. 13 for identification.

Mr. Owens: If your Honor please, we respectfully object to the introduction of this exhibit in evidence. As I understand it, it is based on a survey of selected accounts and, as such, falls within the terms of our order, which requires that the underlying material of statistical computations be made available in advance of the offer.

We have no basis to predicate any knowledge as to [fol. 2453] how wisely or accurately, or anything else, they are in arriving at these estimated tax figures.

Now as I understand the testimony, he has problems in allocating the income he said he would receive in General Motors dividends as between the income beneficiary and remaindermen; before he can determine what the effective tax rate is likely to be, you have to know who it is going to be allocated to. It seems to me that they are trying to ride both horses at once. In the one case you can't tell who it is to go to, and that creates legal problems; and yet here is a survey which purports to show the tax rates which necessarily depend upon a determination as to who it does go to. So that we very strongly object to this until such time as we have had an opportunity to examine the work papers relied upon in the preparation of the statistical tabulations and the survey or sample, or whatever he calls it. This is

the first notice that we have had this morning, your Honor, when this was placed on the desk, at the time Mr. Kennedy commenced his direct examination.

Mr. Tierney: If the Court please, this witness is testifying as to what his estimate is, the range, what the tax rate will be as to the accounts he has been charged with. He has assumed a range from 50 to 60 per cent; and if it comes within that range, then this will be the tax result.

I think counsel's objection goes to the question of the weight.

The Court: The Court will reserve its ruling on this exhibit until after cross examination.

[fol. 2454] By Mr. Tierney:

Q. Now, Mr. Kennedy, have you had prepared an exhibit showing the effect on the fiduciary accounts of the Continental Bank of various assumed declines in the market value of General Motors stock?

A. Yes.

Mr. Tierney: I will ask the reporter to mark this as General Motors Exhibit 14 for identification.

(Thereupon said document was marked General Motors Exhibit 14 for identification.)

By Mr. Tierney:

Q. Is this the document that you referred to, General Motors Exhibit No. 14 for identification?

A. It is.

Q. Will you explain that document, please?

A. In this document we have taken the 845,323 shares of General Motors and added to that the 146,080 shares which we would receive on distribution based on the holding, bringing a total of 991,403 shares and assumed various possible market declines. At 5 per cent the market value would decline to $43,324,311 from a present value of $45,604,538 calculated at $46 a share. The loss would be $2,280,227.

At a ten per cent decline in the market the loss would be $4,560,454. At 15 per cent it would be $6,840,681; at 20 per cent it would be $9,120,908; at 25 per cent it would be $11,401,135; and at 30 per cent it would be $13,681,362.

Q. And if there were estimated taxes that would have to be paid, those would be the taxes that were shown on Exhibit No. 13?

A. This exhibit does not make any allowance for the tax. If you wanted to add that in, and it should be, you would [fol. 2455] take whatever that amounted to. If it were 50 per cent, you would add $2,356,000 to it.

Q. Mr. Kennedy, who would suffer those losses that you referred to in Exhibit 14 based on the assumptions that you have made?

A. Those losses would be suffered by five thousand—more than five thousand beneficiaries, identifiable beneficiaries. There are other unborn children, and many others that are involved in the trusts that we administer.

In addition, there would be all of the thousands of employees that have rights in the pension and profit-sharing trusts that we administer, and as I have indicated to you earlier, Mr. Tierney, we have approximately a hundred of those that hold either General Motors or du Pont or both.

Mr. Tierney: General Motors offers in evidence General Motors Exhibit No. 14 for identification.

The Court: Any objection to Exhibit 14?

Mr. Owens: I understand this is just mathematics based on various assumed levels of market decline, and it is not based on a study, is that correct, Mr. Tierney?

Mr. Tierney: It speaks for itself. It is based on if the market declines five per cent or if it declines fifteen per cent——

The Court: Let's proceed.

The exhibit is received. (Said document, so offered and received in evidence, was marked General Motors Exhibit No. 14.)

Mr. Tierney: That is all. You may cross examine.

Cross-examination.

By Mr. Owens:

Q. Mr. Kennedy, turning first to General Motors Exhibit No. 13, which purports to show certain estimated tax [fol. 2456] rates on the 539 taxable accounts that hold du Pont stock, would you tell us what the basis is for the various alternate figures of 50 per cent, 55, and 60 per cent?

A. I can. We made a survey of a large number of accounts that are involved here, and on the basis of that survey, where we had the information as to their tax status, we found that the large majority of them, both in numbers and amounts, came into this range, and it was clear to me that we will make our decisions on the basis of this kind of a range, and we are presently going to make the decisions on the basis of that kind of a range.

It is not particularly of value to us whether it is 50 per cent, 51, 52, 53, or up to 60, but in that area we measure the effects of that kind.

Q. Did you make this survey, sir?

A. I did.

Q. Personally?

A. With the help of others, yes. I take responsibility for the figures.

Q. Who are the people that actually did the work, sir?

A. I did a good share of the work. You don't know me, but I work. And the men that helped me are men in the Trust Department. We have a large number of men in the Trust Department. I might say that this range falls in very closely with all of the opinions within the department.

Q. Well, can you identify the people who actually did this work of examining the accounts?

A. Could I identify them?

Q. Identify these people by name.

A. No, I don't think I could, because I didn't actually talk to those people. I would send up for the information from how many we had information on, they would take off the number, and that sort of thing.

[fol. 2457] Q. Do you know how many of those accounts of the 539 were surveyed?

A. It would be about half, as I recall.

Q. Were work papers prepared on those, sir?

A. Yes, a lot of scratch paper, work papers, were prepared, and this was the conclusion of the thing. Whenever I make calculations, I don't attach the calculations to the documents. It is a matter of arithmetic with me, a matter of study, and I don't head the columns so that you could see them and when I am through, I tear them up.

It is not to destroy evidence or anything else. I didn't have any idea that anyone would want my writings.

Q. Have you got any way in which we can evaluate the accuracy of these figures without being able to examine such computations?

A. I am sorry, I don't. I will say that I have evaluated them, and we will act upon this as a bank and a trust department.

Q. Do you know how the trusts that you caused to have examined in this connection varied according to the type of trust involved?

A. No, I couldn't answer that question.

Q. Do you have any idea of the distribution or the range of these effective income tax rates?

A. The majority, if you take a distribution chart, you find that the cluster was in this area. They went up to 91 per cent, the top bracket, and the great preponderance of the cluster was within this range, and that is why I chose it.

I think it is an appropriate statistical way of handling it. I have had a little experience in the way of statistics, measuring them, and at least I am satisfied that we will act on this as being fair and honest.

Q. You undertook to make this study at the request of one of the defendants in this cause, is that right?

A. Yes and no. I made the study in connection with seeing [fol. 2458] what the effect would be, because, whether this trial went on or not, I mean, whether I was part of it or not, we have to make judgments—I have to make judgments.

Q. Did you undertake to compile this survey, as you call it, before or prior to being approached by Counsel for General Motors?

A. Before or prior? I don't understand the question.

Q. Excuse me. Before or after. I misspoke.

A. I did it after. In fact, it was fairly recently. I have been quite busy, but I did this within the last few weeks, as a matter of fact.

Q. And at that time, that was at the request of Counsel for General Motors?

A. No, it was done in connection with my studies, but when we saw what the information was in our discussions with Counsel, this was determined to be an appropriate exhibit for this Court. It would be helpful, we thought, to the Judge in making his decision.

Q. Well, isn't it accurate to say that you prepared this at the request of Mr. Tierney for use in connection with this proceeding?

A. Prepared it at the request of Mr. Tierney? I wouldn't think that would be a correct answer.

Q. You don't think that would be an accurate statement?

A. I don't think so.

Q. How many problems did you have in determining who was to pay the tax on the General Motors dividends that might be received under the Government's proposed judgment?

A. Would you repeat the question?

Q. How did you determine who would pay the tax under the assumption that the Government's proposed judgment was ordered executed by the Court and the General Motors stock distributed?

A. Well, I don't know that I can answer your question. [fol. 2459] In this matter of allocation, I have relied upon counsel for that information as to who would have to pay taxes or who would get the allocation. Now, as to the question of the tax, that came into being with the figures.

Q. Do you know who prepared those?

A. They were prepared in our Trust Department, yes. I don't know who would be the man that actually did the compilation for me, but my instructions were to take those trust instruments and arrange them and give the information to me on numbers and amounts on the basis of the tax, yes.

Q. So I take it you did not, yourself?

A. No, I did not.

Q. To either do it or supervise the doing of calculations you had to determine the tax rate?

A. I didn't tell them how precisely, but they are very able men who know how to do it.

Q. Do you know what work papers are available in that connection?

A. I do not know.

Q. Do you know whether they caused the trust instruments themselves to be examined?

A. I am not sure. I presume they did, but I would not know.

Mr. Owens: We renew our objections, your Honor, to the offer of this exhibit. It is quite apparent that this witness is not in a position to vouch for the accuracy of it, and also we have had not made available to us the documents.

The Court: The objection is overruled. It is received in evidence.

By Mr. Owens:

Q. Mr. Kennedy, when did you commence your study of the market effects of the Government's proposed judgment?

A. Well, intensive study, just in the last few weeks. I, of [fol. 2460] course, have been watching the problem early, since the case first came up, but to make determinations for this testimony, just recently.

Q. Did you cause any formal studies to be made or make any formal studies yourself?

A. By formal studies I don't know what you mean.

Q. Well, tell me what the nature of your study was, sir.

A. Well, in the early part, of course, we were watching the proceedings to see what we should do; and as indicated, when the Government plan was announced, then we did take specific actions and at that time we looked into everything we thought necessary to back that decision. But for the study of this material that has been presented to the court, I did that in the last few weeks.

Q. Did you do that yourself, sir?

A. Yes.

Q. Personally?

A. I had the help of lawyers and other people, but I mean, I did the work myself, yes.

Q. What help did you receive from lawyers?

A. Well, the lawyers helped me on the determination of this allocation problem. I presented that to them. The Trust Department would send me any figures I wanted, any material.

Q. Let me stop with the problem you had with the lawyers. Could you detail for us what the nature of your study was in connection with the advice from lawyers?

A. No. I merely asked them the question, and they made the studies for whatever the conclusion they reached, and

of course, we rely on that for our judgments and decisions in the matter.

Q. Mr. Tierney, was he one of the lawyers on whom you relied for that advice?

A. No, he is with the law firm that we have.

[fol. 2461] Q. That represents your bank?

A. That represents the bank, but he is not the man that we looked to on this. It is Frank Mayer of Mayer, Friedlich.

Q. One of his associates?

A. One of his associates, with the company.

Q. Did you call Mr. Mayer in for this purpose?

A. Yes, he has given me the information here.

Q. So I take it this question of the problem involved legally comes from one of the associates of Mr. Tierney, counsel for General Motors in this case?

A. Yes, and of my own knowledge of the problems. It checks precisely with my own background in it.

Q. You don't purport to be a legal expert on this matter, do you?

A. We employ legal experts.

Q. I said yourself, you do not purport to be a legal expert?

A. I find it never pays to be your own counsel.

Q. I take it you don't represent yourself as having expertise in this field?

A. We have legal counsel——

Q. You, yourself, personally?

A. No, I am not qualified as an expert in that field, no.

Q. Did you have submitted to you any formal study or legal memoranda detailing the problems that would be involved?

A. No.

Q. And this knowledge was communicated to you orally?

A. That is right, in discussions.

Q. There are no papers that reflect what those problems were?

A. I have none. I haven't any on file.

Q. I beg pardon?

A. I have none, nor any on file, no.

Q. You are trained as a lawyer, are you not?

A. I am.

[fol. 2462] Q. But you did not require that this legal viewpoint be incorporated in any formal memorandum so you could test in some way the substantiality of the problem?

A. No.

Q. Do you know how many of these trusts that hold du Pont stock now have a legal problem?

A. Have what?

Q. Have a legal problem.

A. No. We have the total, as I indicated, of the number of accounts, but I don't know how many would have a legal problem.

Q. You recognize that some trusts would have a legal problem, and others would not?

A. Others would definitely not, I am sure of it.

Q. But you have no idea of the number?

A. No, I haven't.

Q. Of the 539 trusts that hold du Pont that would have a problem?

A. Yes. That is shown in the exhibit.

Q. You don't know how many of them would have a problem, a legal problem?

A. I don't think we are communicating now.

Q. Well, my question is, you have no way of knowing, out of the total number of trusts that have du Pont stock as an asset, you have no way of knowing, as I understand it, how many of them have a legal problem in distributing the General Motors stock dividend that would be received between the income beneficiaries and the remainder in many instances?

A. No, I do not. I am sorry.

Q. Doesn't that appear to you to be a very important question?

A. No, it is more important to me to know that we have a substantial number that do, and it raises the problem, and the problem is there.

Q. In administering the trusts in your bank, do you address yourself to the situation of the particular trust and the circumstances of that trust, or do you make a generaliza-[fol. 2463] tion on this issue that if they hold du Pont stock, we are not going to bother to examine any further as to whether it creates a problem in this particular trust?

A. No, the men in the Trust Department work with the beneficiaries and the remaindermen. They follow each individual trust.

I work on overall policy only as it relates to the Trust Department, and the individual problems would not come to me unless they were of a person I knew well, or some tie-in that might be important to the bank in some other capacity. I would not have the individual.

The Court: Court stands recessed.

(A short recess taken.)

The Court: Proceed, please.

By Mr. Owens:

Q. Mr. Kennedy, on the basis of the questions that I asked you just before the recess, is it fair to state that you cannot give us any sort of definite figure as to the amount or the number of the trusts that are affected by these allocations problems?

A. That is right.

Q. And is it also accurate that you are unable to give us any opinion as to how substantial or serious the legal questions involved are?

A. Yes, that is a true statement. It would be a major amount, but I could not give you the definition of terms.

Q. You are aware that the legal problems are sometimes simple and sometimes difficult, are you not?

A. I am, yes, sir.

Q. I take it you have no personal knowledge or basis for forming an opinion as to how difficult these problems [fol. 2464] are as legal problems?

A. No. I would rely on our Counsel for that.

Q. Is it fair to say that you encounter a large number of legal problems in the day-to-day administration of trusts?

A. That I personally——

Q. No; that your bank does?

A. Oh, very definitely, yes.

Q. And do you have any basis for an opinion or conclusion as to whether or not the problems raised here are more substantial or more difficult than the ordinary problems that you have?

A. Well, it would be very serious here, because you have such a large amount involved, and you have these large numbers of accounts involved. So it would be a serious problem, yes.

Q. That problem would vary from case to case, would it not?

A. Right.

Q. Then you, I take it, have no idea as to whether it is substantial in one case or relatively minor in another?

A. No, I have not.

Q. In arriving at those estimated income tax rates of 50, 55 and 60 per cent, are those estimates weighted according to the number of shares held?

A. You see, it is a range, and it automatically weights itself when you put the distribution of the amounts on the chart and see where the dots will fall, and just count them out. You have automatically a weighting there.

Q. Well, do you have a weighting by number of shares held, for instance, in making this plot that you speak of?

A. Well, you do it two ways. You can do it by number of accounts, and then you can do it by amounts in those accounts.

[fol. 2465] Q. Which way did you do it?

A. It has been done both ways.

Q. Then, are those work papers in existence?

A. No. It was merely used as a basis for this range that I calculated to show where, in my judgment, it would fall, and on the basis of that judgment where we would take action.

Q. So, as I understand it, your testimony, you have no idea as to the number of instances where a legal problem was created before you could determine—or a legal problem had to be resolved before you could determine what the tax applicable to that trust was?

A. No, I have not.

Q. Now, are you acquainted with the Uniform Principal and Income Act enacted in Illinois in 1941?

A. Only vaguely. I know there was such a thing, and I knew that it came into being several years ago. A number of States have it. But I have no precise knowledge of it. Of course, it only takes effect when it came in and other States are involved other than those States——

Q. But——

A. (Continuing) But that is only general information, sir.

Q. Well, have you been informed, or do you understand that that Act states that in the absence of specific direction in the trust instrument, that extraordinary dividends are to be considered income?

A. That——

Q. That extraordinary dividends are to be considered income?

"Mr. Dallstream: If the Court please, I think the question is unfair as not having raised the full provisions of the statute. My only objection to it is I do not want the record here to contain information by any witness which I think will be misleading to all of us.

[fol. 2466] Mr. Owens: Well, I take it if Mr. Dallstream wants to cross examine the witness or make him his own witness, he can bring out such features of the statute as he thinks are relevant, your Honor.

Mr Dallstream: Why don't you read the statute to him if you want to? It is a very short one.

The Court: Well, he may answer.

Mr. Dallstream: He has testified he does not know anything about it except the general knowledge that it was passed.

By the Witness:

A. I do not think I could answer your question without a study of the statute, and I have not done that.

By Mr. Owens:

Q. Have you made any study of trust instruments administered by your department that are subject to Illinois law and were enacted subsequent to 1941—or the trust instruments were created subsequent to 1941?

A. No, I have not.

Q. Are you acquainted, sir, with the fact that the New York Central Railroad has paid out dividends to its common stockholders on two occasions at least in the stock of the Reading Company and on the third occasion in the stock of the United States Freight Company?

A. I do not recall those, no.

Q. I am not sure I got the dates in which you have been serving in your present capacity as Chairman of the Investment Committee—is that correct?

A. No; I am a member of the Trust Directors' Committee which reviews investment policy, and went on that committee in November of 1956 and I am now chairman of that committee.

[fol. 2467] Do you know whether or not your bank holds in trust any shares of the New York Central Railroad?

A. Offhand I do not know, I presume we do.

Q. Do you recall any problems being brought to your attention in connection with allocation as a consequence of the Central Railroad's declaring stock dividends in 1957 in the shares of the Reading Railroad?

A. None were brought to my attention.

Q. Were any problems brought to your attention in connection with the New York Central Railroad's declaration of stock dividends in the shares of the United States Freight Company?

A. None that I recall.

Q. Would you expect, sir, that if those problems were substantial they would have come to your attention?

A. Not necessarily, unless it created a new precedent or new problem or one of a serious nature. They would handle them themselves in the Trust Department.

Q. Now, you have stated, I believe, in part that you believe one of the factors that would depress the price of General Motors stock is the fact that they would be receiving a stock dividend in kind, that is, General Motors stock, and that would have to be sold in order to provide cash income to the life beneficiary or the income beneficiary; is that correct?

A. Have to be sold to raise the money to pay taxes that would be levied on this distribution, yes.

Q. No, I am not speaking about that for the minute, I am speaking about the amount you suggested might have to be sold because of the fact that you would have to have cash to pay income to life beneficiaries.

A. I did not testify to that.

[fol. 2468] Mr. Tierney: If the Court please, that is not cross examination. He did not make that answer. He did say that there would be sales to pay taxes but I do not think

he mentioned the word "income" for living costs for beneficiaries. It is not cross examination.

Mr. Owens: My recollection may be in error on that.

By the Witness:

A. (Continuing) I do not recall saying that, sir. I was thinking of merely the amount of stock that would have to be sold because of taxes that would be levied, whatever reason that might be for.

By Mr. Owens:

Q. What sort of study did you make in that connection, sir?

A. Well, I had the Trust Department tell me what number there would be of our accounts and the amounts that would be required to pay taxes, and over 80 per cent of them would be subject to the tax consequences of that, is what I was informed.

Q. Did you make any survey of the beneficiaries of the trusts or of trustees to ask their view as to whether they would sell the General Motors or supply the cash to pay the tax in some other fashion?

A. No, I did not.

Q. Do you know whether or not anybody under your direction and control made any kind of a survey or canvass of the people that would have to pay that tax to find out whether or not they would supply the cash from some other source rather than selling the General Motors dividend?

A. I know of no organized survey. They are talking through the Trust Department to the beneficiaries in their [fol. 2469] account relationships all the time, and it might be that they asked such questions, but I have no knowledge of an organized survey being made.

Q. You don't know, in fact, whether they even asked the question, do you?

A. I do not.

Q. I take it then that you cannot have any informed judgment or factual basis for your conclusion as to the extent of such selling in order to pay taxes?

A. I couldn't have an informed guess of the precise amounts, no. I would not attempt that. I do know that there would be a tax problem and that to pay taxes it takes

money, not stock, and that sales would be made, and because of the size and the amount of this in the holdings, those sales would be substantial.

Q. You say they would be substantial. Can you tell me your basis for your opinion that they would be substantial?

A. Because of the amount involved, the number of accounts that hold General Motors and du Pont, and the amount of the stock that would be received in distribution. I can't define "substantial" for you. It is an illusory word.

Q. Would you have to know the other sources of income of the people involved and something of their preferences?

A. They may well have other money to pay taxes; they may elect to use some other stock, but as I indicated earlier the likelihood—and where we have to make a decision, the likely decision would be to sell General Motors, because that would be the stock we would be receiving, and we would have the fixation of the price with the sale, and it would alleviate all the problems of taking another stock which we would have on our books at some other cost basis and paying capital gains on that. So it would be a logical likely one, and the one we would use.

[fol. 2470] Q. Do you know, sir, whether or not most of the assets of your trusts are held on a long-term basis, or whether you handle the investment policy of these securities on a relatively short time, in and out of the market basis?

A. We have all kinds of trusts—some for a short duration, others for long duration. I have no definitive figure as to the distribution between them, but even in the long-term ones there are situations and changes in not only holdings, but in deaths of people involved, and everything of that nature, so that conditions change.

Q. If, as you have testified, in your opinion the price of General Motors were artificially depressed as a result of the Government's proposed judgment, would you as a member of that Trust Committee, recommended the liquidation of General Motors stock under those circumstances?

A. Where we needed money to pay the taxes, we would sell the General Motors stock, yes.

Q. Well, if you had an alternative of raising the money through selling it in what you would consider a depressed market, or raising the money by selling some other asset of the trust, wouldn't you recommend that you sell a security

that was not being sold in what you considered a depressed market?

A. I don't know. It would depend on all the conditions at the time, and the individual nature of the trusts, with concentration on everything that was involved in the trust.

Q. Wouldn't that be a logical course of action, a probable course of action for you to take, if you thought the price of General Motors was, in fact, depressed?

A. We would have to sell on the market whatever it is, [fol. 2471] and here we would be required to raise money and we would sell the General Motors stock.

Q. Would you do that without regard as to how relatively desirable you thought the General Motors stock was as an investment to be continued?

A. I don't know. You can always buy it back. It is a broad market in General Motors stock. We would choose the General Motors stock, I am sure of that, on the basis of circumstances as I see them now.

Of course, you and I, or none of us here, can tell what the condition of the economy or anything else will be over a ten-year, or any other period of time. We might not even know next month. We have ideas, and we base our judgments on what we see coming.

Q. How does the Trust Committee arrive at its decisions with respect to what they will do? For instance, this question of selling the General Motors stock? You would buy both or——

A. No. Accounts are assigned to different men in the Trust Departments, for which they are primarily responsible. Then it is taken to the full Investment Committee, and I suppose they do that in the good old American democratic fashion of arguing out and coming to an opinion, based on all the studies they make, and they make them constantly; but just before a decision is made, they intensify their studies to determine the proper decision at the time.

I think that all men work differently, and we have a large number of men.

Q. Do they make recommendations to the Trust Committee?

A. They make recommendations to the Trust Investment Committee, that is right.

[fol. 2472] Q. As of the present time, have such recommendations been made on this issue?

A. No, I don't think so, except that we decided we were going to sell du Pont stock after the filing of the Government plan—that kind of thing.

Q. I am talking now about the selling of General Motors stock to pay taxes.

A. No, not that I know of.

Q. No recommendations in that connection have been made as yet?

A. Not that I know of.

Q. And you have been expressing your own personal opinion in that regard?

A. I am expressing my own views in that regard, that is right.

Q. And I take it you are not speaking for other members of the Trust Committee, at this time anyway?

A. No, I speak only for myself, always.

Q. Is it common to have differences of opinion between members of the Trust Committee as to courses of action to be taken?

A. That is what makes markets, sir,—difference of opinion.

That is right.

Q. I mean between members of your own Trust Company and not between your bank and another bank.

A. As between individuals you will have differences of opinion on lots of issues; but in the end, a decision is made, and that will be the decision that will be carried out through the bank; and as chief executive officer of the bank, I have a little interest and influence in some of these things that sometimes goes beyond what I would like it to.

Q. Well, could I ask you, sir, whether or not you have really made up your mind on this issue, or whether you [fol. 2473] are going to await the recommendations of the individuals who handle the various trust accounts?

A. Now on which issues are we talking? If it is the question of depression of price——

Q. No, selling General Motors to pay the taxes rather than to sell some other asset among the trust corpus?

A. As of this moment and this day, under conditions as I see them now, that would be my decision, to sell General Motors.

Q. Despite the fact that you have not as yet seen the recommendations of people who actually handle the accounts and know the income situations of the people who would be required to pay the tax?

A. That is right.

Q. I think you testified that one of the things that attracted you to General Motors was the fact that it had a good yield and you used it for those accounts where you had income requirements, is that correct?

A. Yes. I said that we liked General Motors stock; it was a good company and gave you the reasons for it, yes.

Q. Well, it had a good record of providing a steady income, consistent paying of dividends, is that right?

A. That is right, sir.

Q. That is one of the factors I think you testified made the stock attractive to you?

A. No. I testified that it is a large company in the automobile industry, a major one; it has over 50 per cent of the industry total sales. It is a well-managed company, a well-diversified company, and that it would, likely, over the years, show a good record.

Q. Of income-producing quality?

A. Of income, that is right.

Q. Do you see anything in the Government's proposed judgment that would adversely affect the income-producing [fol. 2474] characteristics that has made General Motors stock attractive to you in making your decision?

A. Over the years we have invested in General Motors stock and other stocks in the Trust Department consistently with a view of obtaining capital appreciation, as well as income.

Now, if you add this Government plan, and my view of this depressing effect on the market for General Motors stock, to the other factors which I enumerated in my direct testimony, which is that it is now matured stock in my judgment, and that General Motors can't, over the future years, in my judgment, do as well as they did in this past ten years or so, or 20-year period, because of the backlog of demand——

Q. The question was——

Mr. Tierney: Let him finish his answer, please.

By the Witness:

A. (Continning) Then I think we would turn to General Motors just on an income-producing basis and a yield basis, rather than for any capital appreciation.

By Mr. Owens:

Q. In your estimate of the growth potential of General Motors and its attractiveness as a stock, is there anything in the Government's proposed judgments that you think affects adversely General Motors growth potential?

A. Not in this judgment, I would say no. It has reached its maturity in the stock market and in its operations I think for other reasons and factors. I don't think it has to do with this case. The price does have to do with this case. The level at which we would buy General Motors would be affected by this case, yes.

[fol. 2475] Q. Could you explain that to me, sir, as to why you think the price at which you would be attracted to General Motors depends or changes on account of the Government's proposed judgment?

A. Well, because these large annual offerings and the sales, whatever they amounted to, from the 43 million shares that would be distributed that would be sold for tax purposes, would depress the price of the stock—we would just sit back and wait and see what that depression was.

You see, we don't have to invest in General Motors; we can take some other alternative outlets for our investment of funds, we can take refuge in bills or some other investment, and not have to purchase General Motors.

So we would see the white of the eye before we shoot.

Q. I don't understand why you want—if that is what you are saying—a more attractive yield before you invest in General Motors than would otherwise be the case if the Government's proposed judgment were not ordered into effect.

A. This is a market factor and putting trust investments to work, we want to get the very best yield we can. In any given situation we'd be foolhardy to try to push up the price of the stock just to get a single stock. There are ample opportunities in the market to go with our alternative uses of funds, and we take into account whatever

factors there are affecting not only the general market, in our view, but a specific stock. And here we think, or I do, that this will depress the market. To what extent, I wouldn't try to fix the limits, metes and bounds; but it would be depressing, and I think that we would just pull out whatever purchases we were making ordinarily in the market and wait.

[fol. 2476] Q. Let me ask you, sir, I take it that you have responsibility for participating in the decisions as to those trusts where the bank has discretionary power to invest and reinvest the corpus of the trusts? You participate in the decisions as to what investments will be made, what to buy and what to sell?

A. In the overall policy of it. In this case, we have no doubt—this is a famous case, everyone knows about it—and this will come up in discussions every time there is a major move in the overall committee. As a result of those discussions and overall policy decisions, the individual trust officers will make their decisions. We won't go over the individual cases.

Q. In considering what to do about a stock that you find is declining in value, do you undertake to analyze the reasons for the decline in value?

A. Oh, yes. Curiosity would prompt us, if for no other reasons, but we take into account all the factors we can put our teeth in. We don't try to assign one and two-tenths per cent or eight or ten per cent, but we put the plus factors in and the minus factors and weigh them up in our minds or on paper, or in some other way, and come to a conclusion. We either buy or we sell. We do take action.

Q. And you take that action on the basis of studies by security analysts employed by the bank?

A. By all the information we can get. By men employed in the bank and all the services we can hire and know about. Those fellows have reams of material and are reading all the time.

I take it, or is it accurate to say that the security analysts are engaged in the problems of determining the essential soundness of stock, various kinds of stock, as in-
[fol. 2477] vestments?

A. Well, they are making their living at trying to figure out, and you put more or less weight on them, depending

on whether you agree with their thinking or disagree with what they are doing.

You find analysts telling you to buy one day and sell another. Now, if you have a lot of confidence in one, you might think he is the right one to listen to, but you want to unravel his reasoning, and we do our own thinking in the end.

Q. If they tell you that the stock is depressed. I take it ordinarily they would make some recommendation to you or some explanation to you of what their study disclosed to them as to the basis for the depression in the price of the stock?

A. Oh, yes.

Q. I mean adverse earnings outlook, or some other factor?

A. They will have all kinds of reasons and sometimes they are rather lengthy. I wish they would hold them in a single paragraph or in a single page because it is a lot of reading.

Q. With a lot of securities, it is a lot of reading?

A. That is right.

Q. Well, would you in making your investment policy decisions be disposed to buy a stock if there were some depression on its price, which, in the judgment of the security analysts, was in no way related to adverse earnings prospects or dividend prospects or growth potential?

A. We would take into account all the factors that the analysts said, and if it were our judgment that was the appropriate investment for the accounts, the accounts for which the amounts would be purchased, we would buy the stock.

If we thought that it were not, then we would not buy.

There are other factors in this besides investment [fol. 2478] analysts' interpretations. There are broad moves of the economy affecting areas of the economy, whether it is one industry or another.

There are all kinds of psychological and emotional impasses or impacts on markets. We try to take those into account, and that would be taken into account in this one, as well as the general level that we think the economy will reach and the relationship of that general level to the specific industries that we are considering buying.

I would be glad to discuss investment theory with you, if that is what you are leading to. That is an all day discussion. That is the sort of thing we lecture on in schools. It is a thing that in the street, in the bank, we live with. But some of the things that you can't measure precisely are the effects of what is in the hearts and minds of men.

Q. Investor psychology?

A. Yes, and that is a "lulu" when you come to try to appraise it in terms of percentages. Sometimes it might be what you had for breakfast. But, we don't try to make decisions from the seat of our trousers. We make them from the best judgments we have, based on the most careful studies we could make.

Q. Well, I am suggesting to you sir, that General Motors, if there is any depressant in the price due to large volume of sales and not due to any adverse factors in respect to the outlook for General Motors in terms of earnings, dividends, and so on, that that would cause you to come into the market because of the fact that the stock was selling at what might be a little more attractive price than it otherwise would be?

A. You see, I cannot separate these things and put weights on what it would be without, or what it would be with. I have to look at it as a total.

[fol. 2479] I assume, if the Government plan went into effect, that there would be sales, and it is a matter of arithmetic and other things in supply and demand factors, and the law of economics. When you increase the supply, the price tends to go down; when you increase the demand, the price tends to come up. That is, every other factor remaining the same.

Now, here, you are adding a big factor, a large and important one, and that adds to the supply side substantially.

Q. We are concerned about how much it adds to the supply side. I take it, would you recognize, sir, that we also have to recognize how responsive the demand is to each decline in price, each point or half-point or eighth-point?

A. I can't figure when the demand will appear. It will be on the judgment of the individual investors when and if they might come in.

In my judgment, we would come in to buy General Motors stock only when it reached a bargain basis, because we would not be bidding up the price of the stock. We would be trying to get it at the best price we could buy. That is natural for a buyer.

We don't have to buy General Motors stock, as I indicated. We could put our money in other places, so we would be weighing other alternative outlets for our investment funds.

Q. I take it your whole investment policy is predicated on finding the best available bargain?

A. I would subscribe to that statement, and I think this would be the best.

Q. So that in making any decision on purchasing any security, that is what you are looking at, a bargain, that is a better buy relative to the other alternatives for the [fol. 2480] dollar that you have the power to invest?

A. That is right.

Q. Now, do you anticipate, sir, that there would be any concerted or organized refraining from purchasing of General Motors in order to drive the price down by institutional investors, such as your bank?

A. No, I don't think there would be any organized withholding of purchases. I think it would be each individual's decision on their own, adding up to a very large amount of sitting on the sidelines.

The market has a tendency of reflecting large moves of this kind in different ways, and I am no oracle to tell you what each person is going to do.

Q. You are going to buy it when you think it is a bargain?

A. Right.

Q. And as soon as you think it is a bargain?

A. And we will place the price at which we think it is a bargain in the light of all the existing outlets for money at the time and in our view of what the future will be.

Q. And that is no different than the basis on which you make the decision, whether or not the Government judgment were executed?

A. That is right. Our basis of making the decision is the same.

Q. Then I don't think I understand your conclusion, that General Motors, if I understood you correctly, has to be a

bigger bargain than another security before you will come in and buy it?

A. Well, because we think this is going to depress the price, and we are not going to buy it until we are quite sure that it is a good buy for us. Now, what that relationship is, I wouldn't try to put metes and bounds on it. I just said I would just weigh the alternative uses of our funds.

[fol. 2481] Q. I take it that if General Motors was selling at a price with a better yield than another security of comparable investment quality, you would tend to buy General Motors?

A. Yes, but we would have in the back of our heads the idea that it is going to hit it again and hit it again and hit it again with additional supply, and so for the ten year period we might well say we don't know whether that is going down, down, down, or if it is going to drop completely all the way. There would be a marking of time, a reluctance, and we would have to demonstrate very clearly, these analysts would have to have some pretty good information and so on, to make me change my mind as to what our judgment should be.

Q. I take it before you arrive at any decision, you would look at their analyses with respect to the matter?

A. As to a specific transaction, yes. As to the general principles involved, no. I have studied it and thought it out carefully. But as to specific cases, you look at everything again and again and again, until you make your decision, you see, and conditions change.

Q. I take it that reflects again your personal opinion rather than the committee collectively?

A. That is my own opinion, sir.

Q. I think you suggested that the price at which the yield would be attractive to you would be six per cent?

A. That is on the basis of present alternative uses for funds, the yields that are currently and prospectively available now in the market.

If the whole level and structure of interest rates change, then I would change my views on that. Now, if we have a period when inflation is not considered imminent, and you might have holders of equity securities moving into, in [fol. 2482] large measure, fixed income securities under

an expanding economy theory, I don't know what the rate would be then.

You see, sometimes you have shifts from equities into fixed incomes or from fixed income to equity. There is quite a cross elasticity of demand there, and that sort of thing.

Q. It is a high degree of effective competition between investment alternatives, between fixed obligations and common stocks?

A. Yes, as broad classes, but when it comes to individual cases, and individual stock, then you look right critically at that stock and the items that affect that, in your judgment.

Q. Well, would it be fair to say that that degree of cross elasticity would be closest, say, for General Motors, between General Motors and other high quality common stock investments? That is, area of effective competition between them would be closer?

A. Well, yes, you might compare it with other of the so-called blue chips, but you have many other factors.

When individuals are involved, for example, now the rates that are being paid on state and local obligations are so high and attractive in high tax brackets that effective yield there is pretty large, and you find a good many shifting there. Of course, there is an almost unlimited and unquenchable supply of those coming onto the market that is forcing that rate up.

Now, you might have some of this demand flowing into the municipal obligation territory. You might have it flowing into the United States Government market. You might well have it flowing into many other segments of the stock market, not just those few that you and I might here try to agree on that are in the list of blue chips.

It could flow all through. But when it comes to an indi- [fol. 2483] vidual stock, then that doesn't apply, in my judgment, because you look at that one critically.

Q. Well, there is a larger per cent or substantial percentage of the total dollars available for investment that newly became available or are presently held in existing securities, interested in that area of blue chip or high-grade investment quality common stocks?

A. That varies. Sometimes——

Q. It varies from time to time, but hasn't it been in recent years very substantial?

A. It has been substantial in recent years, and accentuated in recent months with the threat of inflation, and so on. But you have many times and periods and cases where they will move out of the so-called blue chips and go into fixed income securities. Actually liquidate their holdings.

They are not fixed in. They can move back and forth, and they make the decision based on statistical studies of the analysts, what they read in the newspaper, how the foreign events are going, and how they feel.

Q. But do you see anything in your study of the General Motors security that would indicate to you it is likely to move out of the blue chip classification?

A. No. No, it is the leading company in the automobile industry, and I would surely not put it out of the blue chip area.

Q. So you think it is fair to say that in your judgment the reasonable prospects are that it will stay in that classification?

A. That is the basis on which I would say we would buy it on a yield basis or an income-producing basis with this depressing effect of the Government plan, yes.

[fol. 2484] Q. So, I take it, that people who are interested in the blue chip common stocks make a habit of comparing yields between stocks in that category?

A. I should say that is right, and they do.

Q. They would tend to sell the ones that they think comparatively less attractive, and buy the ones they think comparatively more attractive.

A. And they would take into account this Government plan of distribution in so making those decisions, in the case of General Motors, I am sure of that.

Q. Do you think that the degree of increase in demand for a security with each increment, rather, each decrease in price, will be higher in the case of a blue chip industrial than it is of some more speculative security?

A. I just don't know.

The Court: The Court will now recess.

Mr. Tierney: If the Court please, I was going to suggest that Mr. Kennedy got the sad news of the death of his brother in Utah, and he is anxious to get away.

Are you anywhere near through?

Mr. Owens: I have quite a bit more.

Mr. Tierney: All right.

(Whereupon a recess was taken in the trial of the above-entitled cause to 2:00 o'clock p.m. of the same day, Monday, March 30, 1959.)

[fol. 2485] Before Hon. Walter J. LaBuy, Monday, March 30, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.
Present: Same as before.
The Clerk: Case on trial.
The Court: Counsel may proceed.

David M. Kennedy, called as a witness on behalf of General Motors Corporation, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination.—(Continued)

By Mr. Owens:

Q. Mr. Kennedy, you testified this morning, I think, with reference to the number of shares of du Pont stock that were held in taxable accounts of your bank.

A. That is right.

Q. Could you tell us how many shares are carried that are attributable to tax-exempt trusts or institutions?

A. No, I cannot. I know that more than 80 per cent of the accounts that we administer would be taxable under this.

Q. So is it the fair inference that the other 20 per cent are tax-exempt?

A. That would be a fair inference, yes.

Q. Now, you testified this morning with reference to the relative continued attractiveness of du Pont stock; do you recall that?

A. Yes.

[fol. 2486] Q. And I think—would you explain to me again why you thought it would be less attractive? I understood that was your testimony.

A. I don't understand the question. Would you——

Q. Well, will you tell me what you said with respect to the relative attractiveness of du Pont as a stock to the bank?

A. Relative to what?

Q. Whether the Government's proposed judgment is ordered executed or not?

A. I testified that we had been selling du Pont stock because the Government plan was filed and we were concerned about the allocation problem, and to the extent possible we have sold. I testified that we had not been buying du Pont stock after the Supreme Court decision to any extent where there might be an allocation problem.

I testified that the problem of buying du Pont stock, if this decision or this Government plan were adopted, would present very serious problems because we would have the question of the income beneficiary and the remainderman. I think that is about the extent.

I did not relate du Pont stock purchases or sales to any other stock in the market.

Q. Well, I take it, then, the only group of accounts with respect to which du Pont might be less attractive is that group of accounts, which you do not know the number of, or the number of shares that they hold, but that group of accounts where there would be an allocation problem?

A. That would be the group of accounts that would present the problem, that is right.

Q. Otherwise there was no reason to believe that there is anything less attractive with du Pont as a security by reason of the Government's proposed judgment?

[fol. 2487] Mr. Tierney: I object to that on cross examination. He did not go into the attractiveness of du Pont as a stock other than the fact that it would present this dilemma.

The Court: Overruled.

The Witness: Would you repeat your question?

By Mr. Owens:

Q. Is there any other factor, or any factor in the Government's proposed judgment that you think would make du Pont as a security a less desirable investment to the investment trusts?

A. Well, there is this factor, Mr. Owens, that we could not really buy or sell du Pont. We are sort of locked in, as I indicated to you. All the trust companies that have du Pont would be in the same situation we are in. So I think that would have some market effect, but I just do not know what.

Q. By locked in, what do you mean?

A. Well, we cannot sell the stock. If we did we would run into problems there or we would have difficulty buying. We would have the income beneficiary versus the remainderman allocation problem.

Q. Well, except for those that are affected by the allocation problem?

A. That is right.

Q. As respects the other trusts you administer, and the pension trusts that you mentioned you administered, is there anything in the Government's proposed judgment that you perceive would make du Pont less attractive as an investment?

A. Nothing that I see, no.

Q. Now, in General Motors' Exhibit No. 12, I believe your information contained on that exhibit for the period [fol. 2488] from January 4, 1957 to and including February 19, 1959, shows net sales of 16,750 shares. Do you have that exhibit, sir?

A. Yes; in the period since June 4, '57 to February 19, 1959, we purchased 1523 shares and sold eighteen two thirty-eight. Subtracting that out would come to sixteen thousand, seven fifteen, it looks like.

Q. That is right. Now, do you know on behalf of how many trusts those shares were sold, sir?

A. No, I do not. That is the total number of shares but I did not take the number of trusts involved, the accounts involved.

Q. And do you know whether or not those 16,750 shares —what portion of those are related to trusts that have this distribution or allocation problem that you have referred to?

A. No, I don't, because there might have been some sales that did not have that problem involved, but the majority of it was because of that.

Q. Well, do you know what proportion? You say you think that——

A. I am not sure of the proportion but I believe it would be the large majority because we determined to sell when the Government plan was announced in cases where it looked like we would have an allocation problem, and to the extent possible we started to move that stock out.

Q. All right. Are those decisions made by you as the bank, those sellings, or do they represent determinations of other trustees, co-trustees, for instance, that have the discretionary power in that regard?

A. Well, it would be composite in some cases, because where you have co-trustees, they have a voice in it. In other cases, where we have the full authority, it would be our own decision.

Undoubtedly there are discussions going on between the [fol. 2489] beneficiaries and the Trust Investment officers continuously, almost.

Q. Well, do those 16,715 shares represent a net change in all du Pont holdings of the bank, or just the taxable accounts of the bank?

A. Those would represent all the du Pont sales that were made in that period.

Q. So that you do not know what proportion of them may be attributable to tax-exempt institutions?

A. That is what I have said several times, sir.

Q. Now, I take it you participated in some of these decisions with respect to selling du Pont stock because of the allocation problem?

A. Whenever the question would come up at the Director's Trust Committee, I would participate, and I think I have attended all the meetings since I became a member of that committee except for maybe one or two. I may have missed one or two when I was out of town.

Q. Was that decision to sell because of the allocation problem made on the basis, do you know, of recommendation of the executive that handled that trust account?

A. That trust account?

Q. Or those trust accounts? Some portion of these 16,715 shares net selling was made because of an allocation problem, I understand you to say; I also understand you to say you do not know what proportion of that is because of the fact.

A. Well, what is the other part of your question now?

Q. Well, do you know whether or not with respect to the cases where you say they were sold because of the allocation problem, it was done because of a recommendation of the official having charge of overseeing the account?

A. No, I do not know in the discussions with other co-trustees who brought it up. We have been watching this development right along, and our men are familiar with [fol. 2490] the possible impact of this case on our accounts and it is in recognition of that and a study of the questions involved that we have decided to go ahead where we have the power of sale.

Now, I suspect in discussions the officers of the Trust Department would normally talk about all the factors in the market pertaining to an individual case, so that the co-trustees would have the benefit of our views in the matter.

Q. Well, I take it, in summary, that there is no way to tell just how many of these sales of 18,228 shares or net sales of 16,715 shares of du Pont, that is precisely and definitely attributable to this so-called allocation problem?

A. No. You are right in that, except for one little thing. If you take the early part of this exhibit, we had been net purchasers and not net sellers. Taking the period 1956, we bought 3,406 shares of du Pont and sold only 577.

In the period January 1, '57, to June 3, '57, we bought 601 and sold 360.

In that period we bought 4,007 shares and sold 937 shares again, which is a net purchase of 3,070 shares.

Now, my views with respect to du Pont, and I think—at least my own views have not changed, and if it were not for some other factor we probably would have been net purchasers in the second period, but the figures clearly indicate that we were large net sellers.

The next reason for that, in my judgment, is largely this other factor. Now, I know that there might be some inclusion of sales for other purposes when there is an individual situation crops up, but it is clear from the exhibit that the purchases in the early period turn to sales in the second period, and it was a result of this thing that made that change.

[fol. 2491] Q. Now, I take it from that that—did you make these determinations to sell without regard to what you considered the desirability of continuing du Pont as an investment was concerned?

Mr. Tierney: If the Court please, I object to this as repetitious. It has been gone over and over again. Bear in mind this witness has not offered himself here as having made a study of the market prices of du Pont stock. He has not said a thing about the market prices of du Pont stock under any circumstances.

He has testified that it presented a problem and that they would sell du Pont stock because of the problem.

I think this is going far afield of the direct examination and it is also repetitious.

Mr. Owens: If your Honor please, we have here an apparent difference between the purchase position and the sale position. What I am trying to ascertain, we have not been able to get any definite idea of the extent to which any of this selling is attributable to this allocation problem, and I am trying to explore what the other reasons may be in terms of their appraisal of the investment desirability of du Pont.

The Court: Restate the question.

A. Repeat your question, please.

Q. Do you know the extent to which the sales may have been influenced by the bank's view, the Trust Committee's view of the desirability of du Pont as an investment security?

A. No. The great majority of these sales in the period since that decree was as a result of our view that this would present a problem, and we tried to avoid the problem [fol. 2492] to the extent possible by selling du Pont stock.

Now, the other portion of whatever sales might have been included in that figure, I can't give you a measure of the size. My judgment is that it would be very small, because in the early period we were a buyer of du Pont stock and I have seen no reason other than the influence of this thing, that would affect our conclusions on du Pont stock. I know there are some individual cases where someone dies or something happens that you might have to consider.

Q. That is a very possible thing; that could account for a substantial amount of the sales?

A. It would account, in my judgment, for a very small amount, because we directed this policy and it was a review

of these holdings of du Pont stock in the individual trusts that caused us to take this change of attitude and sell stock.

Q. Do you know, sir, with respect to the sales of 18,238 shares, how many of those shares were in trust accounts where the bank had the discretionary power to sell?

A. I do not.

Mr. Tierney: If the Court please, he has asked that question at least ten times.

The Court: Yes, I think it has been covered.

Mr. Owens: I haven't asked that question.

Mr. Tierney: I suggest that you have.

By Mr. Owens:

Q. You testified this morning, Mr. Kennedy, on direct examination with reference to the matter of the Government plan frustrating the purpose of the bank in investing in du Pont.

A. I did, sir.

[fol. 2493] Q. Would you explain to me again, sir?

A. I shall try. When we bought du Pont stock and held it in our trust accounts, we intended that for the benefit of the income beneficiaries and the remainderman on the end of the life tenancy; and here we have a problem of allocation which will give to the income beneficiary something that originally hadn't been intended, that is, the distribution of this stock in those cases where it would be distributed to the income beneficiary, and it would take it away from the remainderman at the conclusion of the life tenancy, at which point we would either distribute the stock or sell the stock of du Pont and turn over the proceeds, and that price of course would reflect the value of the General Motors stock included in the du Pont price.

Q. Would it not depend, sir, upon whether or not the General Motors dividend was paid out in addition to the current dividend rate of du Pont?

A. Well, I assumed, in my thinking, that it would be paid out in addition to. I haven't given careful thought to the other problem of making it part of the regular dividend. I assumed that that would create untold problems on the other side of adding money into du Pont which they would have to do something with; but my study and thought and energy was put on that basis.

Q. Now would you tell me again what you thought your estimates would be of per cent decline or depression in the price of General Motors——

Mr. Tierney: May it please the Court, I object to that. It is not proper cross examination. The witness did not testify to that at all.

Mr. Owens: You mean as to the precise per cent?

[fol. 2494] The Court: I don't recall that he testified to that at all. I will sustain the objection.

Mr. Owens: I think, if your Honor please, in fact I am sure that the witness testified as to the depressant effect on the price of General Motors.

The Court: You could ask him what percentage he thinks it would decline. But he hasn't testified to percentages at all.

By Mr. Owens:

Q. You have testified with respect to the fact that there would be a depressant upon the price of General Motors as a result of the distribution under the Government's proposed judgment, have you not?

A. I am convinced of that fact, sir—that the increase in the supply would depress the price, but I don't know how much.

Q. You have no idea as to how much?

A. None at all.

Q. In reaching a conclusion as to the fact that it would have a depressant effect upon the market price of General Motors, did you, sir, make any assumptions with respect to the manner in which the stock would be marketed?

A. I assumed that they would use good judgment in the offering of the stock. They might not, but I assumed that would be done. I don't know what would happen with the selling by the millions or hundreds of individuals, or thousands, that would have to raise money for taxes on it, because that happens and there is no measure on that; but I assume that the twenty million shares that would be sold in ten years would be handled well.

Q. Did you assume that there would be a difference in the market effects depending upon the manner and tech-

[fol. 2495] nique of the marketing?

A. There would be differences, I should think, of definitely, on impact, depending on how it was handled. I assume it would be handled as well as could be done, realizing full well that market factors change over a long period of time. You have all kinds of attitudes of mind with respect to markets, and "The best laid schemes o' mice an' men Gang aft a-gley, An' lea'e us nought but grief an' pain For promis'd joy." You find many cases where moderate sized or small offerings are handled by good dealers just as well as could be done, but something happens and they don't go too well. But I assume this would be done well.

Q. Do you assume that it would be done by a series of secondary offerings?

A. I didn't isolate how it would be done. I said it would be done well. If you want my judgment as to how it might be done, I should think a secondary offering, where it is handled by a syndicate, would be the only way it could be done well. But that is another question. I am not here to tell them how to do it.

Q. Do you recognize, sir, that this effect may very well be markedly different, depending upon the techniques that are employed in doing the actual marketing?

A. I recognize that and I put my weight on the supply factor. In my study of markets, I weigh pretty heavily supply and demand, and this is an additional supply of size, assuming it is handled well. You will have all kinds of periods of time and various conditions under which it will be offered.

Q. Have you made any studies of what the correlation is likely to be between increases in volume and declines in price?

A. Not precisely for this purpose. I have made such [fol. 2496] correlations on other occasions, but not for this. We are not up against the gun of doing any great work on this question of precision, to get an eighth or a sixteenth, or any percentage point. My point is precisely that it will depress the market, and I think substantially.

Q. Did you consider whether, for instance, the annual offerings, the extent to which they would be a percentage of the total outstanding equity of General Motors would influence the depressant?

A. I did not put various weights onto the various factors I took into consideration in this, no.

Q. Did you take that factor into consideration, sir? Regardless of the weight you consigned to it, did you take that factor into account in any way?

A. I really don't know how to answer your question. I thought of that point. Now, how much I would put down on one side of the pros and cons, as I indicated to you this morning there would be plus factors and minus factors, and I don't recall how much I put into that one, no.

Q. Do you recall whether it was a plus or a minus; that is, a favorable factor indicating a small depressant, or a non-favorable factor indicating a large depressant?

A. I don't think that would have much influence in this situation, because of the vast amount of the annual offerings in the market.

Q. What did you assume, sir, with respect to the amount of shares of stock that would have to be sold upon the open market annually?

A. Would you repeat the question?

Q. What did you assume with respect to the number of shares of General Motors that would be required to be sold on the open market annually?

[fol. 2497] Mr. Tierney: By the trustee, you mean?

Mr. Owens: By the trustee, yes.

By the Witness:

A. Well, I had assumed that there would be 20 million shares in a 10-year period, an average of two million shares a year. I don't know what variation they might make in that. That was my assumption.

By Mr. Owens:

Q. Are you acquainted, sir, with the extent to which General Motors purchases General Motors stock on the open market for its bonus stock plan?

A. Just generally; not in detail.

Q. What do you understand about that?

A. I know they have a bonus plan and they purchase stock. I have heard some very large figures, up as much

as a million shares, or something, per year; but it is a bonus plan. I presume if they don't have earnings that they wouldn't be purchasers of bonus stock; but that is already reflected in the market, and I am impressed that last year General Motors stock declined despite whatever purchases they might have made.

Q. Would you examine Government Exhibit 172, please? Have you seen this exhibit before, sir?

A. No, I have not. This is the first time I have seen it.

Q. You will note that the purchases have been adjusted in terms of the present par value of the stock. Directing your attention to column 1, purchases of the outstanding common stock for the Bonus Plan, I think you will note that for the years 1956 and 1957, the purchases were [fol. 2498] 1,024,000-some odd. Both years were in excess of one million dollars.

Did you consider, sir, the extent to which it might be possible to dispose of this stock in part by having the Court order General Motors to make its purchases of bonus stock directly from the trustee?

A. No, I am sorry I didn't. This is already reflected in the market. It was there, and whatever the price reaction in the market has reflected these purchases, so there must have been—I am impressed by the fact that there must have been people that were willing to sell 1,024,000 shares on the other side of the equation, and if you take it over on the one hand, it seems to me, and have it distributed directly to them, it would just dry up some of this demand that is already being reflected in all of our current thinking and decisions.

Q. Well, do you have an opinion, sir, with respect to the amount of drying, for instance, that might be attributable to purchases of this magnitude?

Mr. Tierney: I object to that, your Honor, as calling for the opinion of the witness. He is asking him as a market expert, and he is not presented as a market expert.

The Court: Overruled.

By the Witness:

A. No, I have no idea of what it might have done, but whatever supporting factors there were in it were already

reflected in the prices, which you can take from the daily newspapers.

By Mr. Owens:

Q. You have no idea what percentage effect it might have?

A. Not a bit. If it hadn't been for that, there would have [fol. 2499] been that many sales, I presume. Somebody wanted to get that sum of money, so they sold their stock, and it is reflected in the market quotations, and you can look at the quote sheets as well as I can.

Q. You have no idea, I take it, as to the amount by which the person wishing to purchase General Motors had to pay in addition because of the increase in price in General Motors that might have been occasioned by purchases of this magnitude?

Mr. Tierney: I object to that.

By the Witness:

A. I haven't any idea.

By Mr. Owens:

Q. I beg your pardon?

A. I can't give you any figure, any definitive figure on that.

Q. I ask you to look at column 2, and drawing your attention to the years 1956 and 1957, the figures for 1956 of 986,873 and for the year 1957, 1,167,973 shares newly-issued common stock for the Savings Stock Plan in General Motors.

Are you acquainted with that plan, sir?

A. No, not in detail. I only know that they have it. I didn't know the amounts until I saw it here.

Q. Well, I ask you whether or not it would influence your opinion with respect to the depressant effect on General Motors if the Court were to order General Motors to acquire the stock for its Savings Stock Plan from stock held by the trustee under the Government's proposed judgment?

Mr. Tierney: If the Court please, I object to that ques- [fol. 2500] tion as assuming something that has never been even suggested here.

The Court: Sustained.

Mr. Owens: If your Honor please, I am asking the witness to assume that fact, and asking him how it would influence his judgment with respect to a likely depressant on the General Motors stock.

The Court: The ruling stands.

Mr. Owens: I didn't hear, your Honor.

The Court: I said the ruling stands.

By Mr. Owens:

Q. Did you take into account in any way, sir, the relationship between the probable volume of transactions involved in these sales required under the Government's proposed judgment and the total trading in General Motors stock on various stock exchanges?

A. No. I know that General Motors is a widely-traded stock, has a broad market, and I assume that that would be a broad resilient market in which to deal.

I didn't assume that it was a restricted market at all. My judgment was on the basis of the existing fact that there is a broad market for General Motors stock. You can buy stock, you can sell in size at a price.

Q. Did you consider to any extent the disposition of institutional purchasers to buy stocks in blocks?

A. No, I did not. I knew as a background that there are large investors that are, over periods of time, buying stocks, pension trusts and others, but I keep coming back to the fact that they are not required to buy General Motors stock, just as in the administration of our own pension [fol. 2501] funds we are growing also, and that those funds come into the same rules of judgment of thought and action that you would have with respect to other kinds of investment funds.

They do have alternative investment places that they can put their money, and they should, and I believe do, use their best judgment as to what particular stock they would take for purchase or for sale.

Q. Well, General Motors stock has been one of the favorite securities, has it not, for investment of funds of those institutional purchasers?

A. It has been an outstanding stock, as I indicated. It is a widely held stock. It is a well managed company. As

I indicated, it has a broad coverage in the automobile field, and all that sort of thing.

Q. Do you have any knowledge, sir, as to the trend among institutional purchasers to acquire stock by private purchase off the exchange of large blocks?

A. That, sir, varies. The trend at one time is to buy; and at another time it is to sell. Depending on judgment——

Q. I mean in large blocks, though, as distinguished from trading on the exchange?

A. No, I don't know.

Mr. Gribbon: I object, your Honor, to that question. There is no foundation for it and no testimony to that effect.

Mr. Owens: I am trying to ascertain whether he is acquainted with any trend of that nature or that character.

The Court: Overruled.

Mr. Gribbon: That is a different question.

By the Witness:

A. I am not sure that I understand the question. It assumes a trend. Now, what trend are you talking about?

[fol. 2502] By Mr. Owens:

Q. I will leave aside the question of whether there is a trend or not.

Do you know whether there is an increasing tendency or not for institutional purchasers to attempt to effect a purchase by large blocks rather than by purchasing on the exchange?

A. Large blocks of any stock?

Q. Of stocks generally, when they want to acquire securities.

A. There is an attempt by purchasers any time to find stock in whatever way they can. When it comes to the Stock Exchange, the offerings go in and the demand comes in, and they come out on an equation.

Now, on the question of if you hear or know of a block and you are in the market for it, and you could buy it, I am sure that is being done daily.

Q. When that occurs, have you made any consideration as to the extent to which that affects the stock, the price

on the Stock Exchange as against when that size block is traded on the exchange?

A. No. I am sorry. I can't give you an answer to that question.

Q. Well, have you, in forming your judgment as to the fact that it would have a depressant effect, taken into account any instances or examples in your experience where a seller was known to have, or would be known to have a large block such as a trustee would under the Government's proposed judgment?

A. I took into account everything that I could think of that I thought was relative to the judgment that there would be a depressing effect. No matter how you cut the cloth, it seems to me that an increase of supply of that size, [fol. 2503] assuming it to be well handled in the best way you can visualize, and I will take your word for it, that there would be a depressing effect by the addition of that much supply in the market, no matter how it were handled.

Q. Well, do you recognize that it is important to come to an informed judgment as to the extent of that depressing effect?

A. Not for my purpose or for the purpose of the bank, and so on. When we think of stock of this kind, size, and the importance of the holdings is going to be depressed in price, our judgment, my judgment, would be to wait before buying and perhaps sell early, until I see how far it is going down.

Q. Well, is that contrary to the usual determination you make in your bank with respect to the matter of trying to anticipate and move accordingly?

A. We are certainly anticipating in this case. We started early watching the developments and we started to sell du Pont early, and we are watching the developments now as to what we would do with General Motors, and I have indicated the answer to that question.

Q. On the basis of the market prices of du Pont during the period 1958 when you sold those shares, do you have an opinion as to the wisdom or lack of wisdom in making that determination to sell?

Mr. Tierney: I object your Honor.

Mr. Cowen: Objection, your Honor.

The Court: Sustained.

Mr. Owen: May I know the basis of the objection so I can prepare to argue it, your Honor?

The Court: Do you wish to explain the basis of your objection?

Mr. Cowen: I don't think this witness should be called [fol. 2504] upon for a judgment as to what happened on the action he took in this particular regard. We are talking about du Pont now.

Mr. Owens: We have, I believe, General Motors Exhibit 14, which purports to show losses ranging from two mill on dollars on the securities held by this organization to thirteen million dollars, based on various assumptions of decline.

The Court: Read the question, please.

Mr. Tierney: If the Court please——

The Court: All right.

Mr. Tierney: If the Court please, the statement that counsel has just made is misleading because the exhibit to which he refers, refers to General Motors stock and not to du Pont.

The Court: Now read the question.

Mr. Cowen: One more thing, your Honor. He is talking about wisdom. Is this witness to be questioned as to whether it is wise or not wise?

That was the basis of my objection.

The Court: That was the basis of my ruling.

Read the question, please.

(Question read.)

The Court: I sustain the objection.

Mr. Owens: Your Honor, may I have a word with respect to that?

The Court: No, don't argue it further. State another question. I have ruled.

[fol. 2505] By Mr. Owens:

Q. In the light of the experience subsequent to selling those shares of du Pont stock that you sold, do you have an opinion now as to whether or not you will continue to pursue that course?

A. Our policy is continuing.

Q. In connection with forming your opinion, sir, did you make any study of other large secondary offerings?

A. No.

Q. Did you make any assumptions with respect to whether the sale would be—I think you testified you thought they would be done in part at least by secondaries?

A. I testified that I thought they would be done well. I didn't say how. You asked me how it should be done, and then I tried to think out loud that it probably would be a good idea to make a secondary, but there we were just thinking aloud together.

Q. Did you make any study in connection with your testimony of the growth, rate of growth in absolute terms or rate of growth of pension and profit sharing plans?

Mr. Cowen: Your Honor, I think he answered that question a number of times. He says he did not.

Mr. Owens: I don't believe he has answered that question.

Mr. Cowen: I think he has.

The Court: He may answer. I don't recall it.

By the Witness:

A. No, I did not. I know that they are growing. When I was at the treasury, we made studies of pension funds to see what percentage of their assets would go into Gov- [fol. 2506] ernment securities, and they are a substantial buyer of United States Government securities.

I haven't tried to put metes and bounds on it, and again, that doesn't necessarily imply that in their purchases any particular kind of security, any single one, would be purchased.

It might be that while other pension funds are growing and buying stocks that the one that is being depressed is the one that they are not buying, but the one that they are selling.

Q. I take it, then, you did not make any studies with reference to the past Ford Foundation financing of ten million, two hundred thousand shares or its prospective offering of two million shares?

A. No, I was not impressed with the magnitude of that in relation to the magnitude of this one.

Q. Did the tax question enter your judgment except in connection with the sales by people who would have to

raise money to pay the taxes on General Motors stock received?

A. No. I was thinking in terms of the ones who received the distribution of the forty-three million shares that taxes would have to be paid, and they would have to sell General Motors in order to raise money to pay these taxes.

Q. That is the only consideration you gave to tax implications of the Government's proposed judgment?

A. Except as I made judgments with respect to the taxes in connection with the sales in our own department where you have the allocation problems, and so on.

Q. Did you attempt to make any analytical study of the degree of elasticity of demand for General Motors [fol. 2507] stock?

A. No. That is a term that is widely used and poorly understood. It comes back to what I said this morning, that markets and periods vary and demand will go from one market to another; but I could not measure that. I am not that smart.

Q. Well, are you able to express an opinion with respect to the relative degree of cross-elasticity among securities compared to other commodities, for instance?

A. I do not understand your question. Will you elucidate?

Q. I said, do you have any opinion with respect to the relative elasticity of demand between securities as compared with other commodities?

A. No, I have not.

Mr. Owens: No further questions, your Honor.

Mr. Tierney: No questions.

The Court: You are excused.

The Witness: Thank you.

(Witness excused.)

OFFERS IN EVIDENCE

Mr. Gribbon: If your Honor please, I have a few exhibits to introduce at this time, which will not require the presence of a witness on the stand because the Government has agreed to them. With Mr. Tierney's permission, may I proceed to have them introduced?

Here is a set of exhibits. Before I proceed to the exhibits that have just been handed to your Honor, I should like

to move the introduction in evidence of exhibits that have been previously identified but not introduced in evidence, namely, du Pont No. 1, No. 2, No. 4, No. 5, No. 37 and No. 47.

At the time that these exhibits were discussed, through an oversight they were not—no motion was made for their introduction in evidence.

The Court: Are there any objections?

Mr. Reycraft: I do not know which ones they are. May [fol. 2508] I first look into them before you rule? I do not know what they are.

The Court: All right. The Court will defer its ruling until you have a chance to look at them.

Mr. Reycraft: Thank you.

Mr. Gribbon: I should like to ask that there be marked as du Pont Exhibit 48, a tabulation which is entitled, "Investment in General Motors Corporation Common Stock, June 30, 1958."

(Thereupon said document was marked Defendant du Pont Exhibit No. 48, for identification.)

Mr. Gribbon: Exhibit 48, your Honor, discloses the du Pont Company's cost for tax purposes of all General Motors shares which it owns.

I should like to have marked for identification as du Pont Exhibit 49, a tabulation entitled, "E. I. du Pont de Nemours Company Capitalization, December 31, 1958."

(Thereupon said document was marked Defendant du Pont Exhibit No. 49, for identification.)

Mr. Gribbon: May there be marked for identification as du Pont Exhibit No. 50, a tabulation entitled, "Classification of du Pont Stockholders by Type of Investor of Record, December 31, 1958, Common Stock?"

(Thereupon said document was marked Defendant du Pont Exhibit No. 50 for identification.)

Mr. Gribbon: Exhibit 50, your Honor, simply gives the latest available figures on a breakdown of the record holders of du Pont stock.

[fol. 2509] May there be marked as du Pont Exhibit 51 a tabulation entitled, "GM Shares Allocable to Various du Pont Stockholders Under Government Proposal."

(Thereupon said document was marked du Pont Exhibit 51 for identification.)

Mr. Gribbon: This tabulation, as your Honor will see, indicates the number of shares of General Motors stock owned by du Pont which might be considered as allocable to Christiana, to Delaware, to the stockholders of Delaware who are also stockholders of du Pont, and to all other stockholders of du Pont.

The figures shown as being representative of the holdings of stockholders of Delaware are taken from Government's Exhibit 437, which has previously been offered in evidence.

May there be marked for identification as du Pont Exhibit 52 a tabulation entitled, "Volume of Trading in Five Most Actively Traded Stocks for Which Turnover Ratios are Shown in Government Exhibits 449 to 453."

(Thereupon said document was marked Defendant du Pont Exhibit 52 for identification.)

Mr. Gribbon: Your Honor will recall that during the examination of Mr. Boni there was testimony as to the turnover ratio of General Motors stock, and during his cross examination reference was made to the absolute volume of trading in General Motors. It will be seen in each of the years covered here General Motors was one of the five most actively traded stocks.

May there be marked for identification as du Pont Exhibit 53 a chart entitled, "End of Month Closing Prices on New York Stock Exchange of American Telephone & Tele-
[fol. 2510] graph Company Common Stock, Compared With Standard and Poor's Utility Stock Price Index and Closing Price of Five Other Utility Companies."

(Thereupon said document was marked Defendant du Pont Exhibit 53 for identification.)

Mr. Gribbon: Your Honor will recall that in the course of the Government's case considerable evidence was introduced as to the financing by American Telephone & Telegraph Company, and there have been references throughout the Government's case and in cross examination of the du Pont and General Motors witnesses as to the market behavior of the AT&T stock compared with that of other comparable companies.

Du Pont Exhibit 53 merely shows AT&T in relationship to other major utilities and in effect deflates it by reference to the price action of the Standard and Poor's Utility Stock Index.

May there be marked for identification as du Pont Exhibit 54 a three-page tabulation entitled, "Distribution of Common Stockholders by States and Current Individual Income Tax Rates Applicable to Dividend Income in Each State."

(Thereupon said document was marked Defendant du Pont Exhibit 54 for identification.)

Mr. Gribbon: Du Pont Exhibit 54 shows the distribution of common stockholders by states and then indicates in the columns on the right hand side those states which do have income taxes and gives an idea of the range of rates in the states where there is an income tax.

May there be marked as du Pont Exhibit 55 a tabulation entitled, "General Motors Common Stock, Odd Lot Trading, [fol. 2511] Adjusted for Stock Splits to Present One and Two-Third Dollar Par Value Shares," and also marked as du Pont Exhibit 56 a similar tabulation with respect to du Pont stocks, marked, "Du Pont Common Stock Odd Lot Trading, Adjusted for Stock Split to Present $5 Par Value Shares."

(Thereupon said exhibits were marked Defendant du Pont Exhibits 55 and 56 for identification.)

Mr. Gribbon: As the footnotes to Exhibits 55 and 56 indicate, these figures are taken from Government exhibits that have been previously marked and received in evidence. Those exhibits, however, show purchases and sales in gross and do not break it down. Accordingly, Exhibits 55 and 56 are intended merely to show the net purchases on an odd lot basis, both of General Motors and of du Pont in the years '46 through '57.

May there be marked as du Pont Exhibit 57 a tabulation, entitled, "Secondaries Handled by Bache & Company."

(Thereupon said document was marked Defendant du Pont Exhibit 57, for identification.)

Mr. Gribbon: During the course of the Government's case, Mr. Weiss of Bache & Company testified as to his

experience in handling secondary offerings, and noted specifically some eight of them that Bache & Company had handled.

Information has been secured from Mr. Weiss which reflects the dollar value of the secondaries and, as Exhibit 57 shows, the total dollar value of the eight secondaries that he testified to was $22,625,375.00.

I should like at this time to move the receipt in evidence of du Pont Exhibits 48 through 57.

[fol. 2512] Mr. Reycraft: May I examine Exhibit 54, Mr. Gribbon?

Mr. Gribbon: Yes.

Mr. Reycraft: No objection.

The Court: Proceed.

(Said documents, so offered and received in evidence, were marked, respectively, Defendant du Pont Exhibits 48 through 57, inclusive.)

Mr. Tierney: If the Court please, may we have about a ten-minute recess before we call the next witness?

The Court: Very well. We will take a recess at this time.

(Whereupon a short recess was taken, after which the following further proceedings were had:)

The Court: Proceed.

Mr. Tierney: If the Court please, General Motors calls Mr. J. Russell Forgan.

I would like to say to the Court that Mr. Forgan has developed a cold while he has been visiting his old home town here, and we'll all have to bear with him a little bit, I guess.

JAMES RUSSELL FORGAN, called as a witness on behalf of General Motors Corporation, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Tierney:

Q. Will you give the reporter your name and address, please?

A. James Russell Forgan; 640 Park Avenue, New York City.

Q. Mr. Forgan, what is your present occupation?

[fol. 2513] A. I am a partner in the investment banking firm of Glore, Forgan & Company.

Q. What has been your employment history, Mr. Forgan?

A. I started to work just after I graduated from college, in 1922, with the National City Bank of Chicago. I was a clerk in the cages, I was a bond salesman, and I eventually became an Assistant Cashier of the bank; and when the bank merged with the National Bank of the Republic, I became an Assistant Vice-President of the merged bank.

In 1927 I left the commercial banking business and went into the investment banking business as a Vice-President of an investment banking firm in Chicago called Brokaw & Company.

In 1931, I became a partner of Field Glore & Company, and in 1934 I made a deal with my partners to go to New York for six months, and I have been there ever since.

The late Marshall Field retired from the firm and I became the senior partner in charge of the New York operations. Then in 1937 the name of the firm was changed to Glore, Forgan & Company.

Q. Are you a director of any other corporations or companies?

A. Yes.

Q. What are they?

A. The principal ones are the Borg-Warner Corporation, Studebaker-Packard Corporation, and the National Distillers and Products Corporation; and I am a member of the Advisory Committee of the Bankers' Trust of New York.

Q. So for 28 years you have been a partner in either Glore, Forgan & Company or the Field, Glore Company, is that true?

A. That is correct.

[fol. 2514] Q. What is the business of Glore, Forgan & Company?

A. We are members of the stock exchange, and our primary business is investment banking.

Q. Will you tell the Court what are the functions of an investment banker or banking firm?

A. There are quite a lot of functions, but I think for the purposes of this testimony I will restrict it to our main function.

The important thing to remember is that an investment banker is a merchant of securities. He is not an investor in securities, and his chief occupation is to buy securities and to resell them to the public.

Q. So for nearly thirty years you have been in that business of underwriting and distributing securities as an investment banker?

A. That is correct.

Q. Now, Mr. Forgan, as an investment banker, have you had occasion to study the stock market and the valuation of securities?

A. Yes.

Q. Is that an important part of the business of investment banking?

A. It is the very life blood of the business. We have to, dealing as we do in all types of securities, both equity and debt securities, we have to make a day-to-day study of markets, because the pricing of the securities that we sell to the public must be good for both the buyer and the seller.

Q. Well, suppose it is not a good deal for the buyer, what is the result?

A. The next time we have an issue and offer it to him, he will probably be out to lunch.

Q. He would not be interested in anything you bring out after that, is that correct?

A. He might not be.

Q. Well, now, if it is not a good deal for the seller, what is the result?

A. Well, we might lose a very valuable underwriting [fol. 2515] client, and certainly it wouldn't help our reputation any as far as the trade is concerned.

Q. So your problem in successful underwriting is to have a good deal for the seller, a good deal for the buyer—and how about some reasonable profit for yourself?

A. Well, we like that.

Q. Now, then, as an underwriter, are you constrained to keep currently posted, that is, day-to-day, by a study of the market?

A. Yes, we must, because if we consistently either overprice it or underprice it, the securities that we were offering the public, competition would drive us out of business quite quickly.

Q. So it is important that you try to estimate as correctly as you can, is that true?

A. Yes.

Q. Mr. Forgan, was Glore, Forgan and Company retained by General Motors to make a study in connection with this case?

A. Yes, we were.

Q. What sort of study was Glore, Forgan asked to make?

A. We were asked to estimate from the underwriting standpoint the effect of the Government's plan on the market for General Motors stock, and we were also asked, again, from an underwriting standpoint, to advise on the effect on General Motors equity financing during the period of the decree, what effect that might be.

Q. Did you make such a study?

A. Yes.

Q. In connection with that study, did you familiarize yourself with the Government's proposed decree?

A. Yes, I did.

Q. And did you also familiarize yourself with the Internal Revenue Service tax ruling?

A. Yes, I did.

Q. You know, then, that the distribution of the General Motors stock or shares, or the proceeds of sales thereof, [fol. 2516] would be treated as ordinary income or dividends for ordinary income purposes?

A. Yes.

Q. Now, based upon your study, have you an opinion as to the nature of the impact upon the market price of General Motors stock if the decree proposed by the Government were to be entered?

A. Yes, I have.

Q. What is that opinion?

A. My opinion is that if the decree were entered, the market for General Motors stock would be drastically depressed.

Q. Will you please state, first in general terms, the basis for your opinion that the Government proposed decree would have a very depressing or disastrous depressing effect upon the price of General Motors stock?

A. Well, here you have 63 million shares of General Motors stock coming out of one strong hand and going into thousands of weaker hands. You are increasing the supply of General Motors stock by an unprecedented amount, without any corresponding demand; and it is simple high school economics that if you increase supply to that extent, the only remedy for it is a decrease in price.

Q. Now, I should like to review with you in somewhat more detail the supply and demand factors which you have mentioned.

Turning first to the supply factor, how much General Motors stock would be forced upon the market by the terms of the decree?

A. Approximately 20 million shares over a 10-year period, and I have been assuming that it would be sold about two million shares per year.

Q. Now, are these forced sales of particular importance in the supply and demand picture?

[fol. 2517] A. Very important, because where you have forced sales, almost always the only remedy for it is the drastic decrease in price.

Q. In addition to those forced sales, an additional 4,300,000 General Motors shares would be distributed to du Pont stockholders each year, would they not?

A. That is correct.

Q. Now, in your opinion, would any of those additional 4,300,000 shares also find their way into the stock market?

A. Yes, I think they would.

Q. Why would that be?

A. Well, the primary reason would be that the du Pont stockholders would have to sell some of the General Motors stock they received to pay for the additional taxes which would accrue under this plan.

Q. Have you an opinion as to how many of those 4,300,000 General Motors shares would be sold each year to raise money for taxes?

A. Yes, I have

Q. What is your opinion?

A. My opinion is that a minimum of a million shares, and possibly as much as a million and a half or more, would be sold for tax purposes.

Q. Well, then, in your opinion the combination of the forced sales under the decree and the tax selling would approximate three to three and a half million shares per year, is that correct?

A. That is correct.

Q. Now, Mr. Forgan, you said that there would be forced sales of 20 million shares and tax sales of 10 to 15 million shares over the ten-year period.

Might there be additional sales of General Motors stock as a result of this decree?

A. I am convinced that there would.

Q. What would be the cause of those additional sales?

A. Two things: Fear and confusion.

[fol. 2518] I am of the opinion that a great many of the smaller stockholders and the less well informed stockholders would sell simply because they didn't understand the situation and were afraid of it and would rather reinvest the proceeds in a more stable stock where they didn't have these questions overhanging the market.

Q. Have you any idea as to whether that type of selling might have a general effect on the stock?

A. In my opinion it could have and if it got into panic selling it could have a general effect on all stocks on the Stock Exchange.

Q. Could you estimate the volume of stock which might be added to the market because of this fear or panic selling?

A. No, I can't pinpoint that. When you get to dealing with those kinds of elements, you have no way of judging what it might be.

Q. In your opinion, what would be the most feasible method for the trustee to use to dispose of the twenty million shares of stock if this proposed decree were put into effect?

A. I would think that the only feasible method would be through an underwritten secondary.

Q. Wouldn't it be possible for the trustee to sell this stock on the New York Stock Exchange or some of the other exchanges?

A. Yes, I think it would, but the slaughter in values would be terrific.

Q. What do you mean by that?

A. Well, I mean simply this: That if he had to sell on the New York Stock Exchange each year, for instance, two million shares, the whole world knows he is doing it, that is, the financial world.

In addition to that, he would be competing with the sale of stock on the exchange for tax purposes plus the fear and confused selling that I have mentioned, and I think he [fol. 2519] would get much lower prices than he would with a secondary offering.

Q. Why would he get a better price through underwritten secondaries than by selling on the exchange?

A. Well, there you bring into the situation many hundreds of investment banking houses and dealers and many thousands of salesmen, and there I think that through that mechanism, you could create an additional demand; in other words, to find new stockholders for General Motors.

Q. Well, would the offerings on the New York Stock Exchange create additional demand?

A. No. Offerings on the auction market don't create additional demand except as the latent demand comes up through radical readjustments of price. That is the only way it can be created.

Q. What is the function of an underwriter, such as yourself, in a secondary offering of stock?

A. Underwriters primarily are wholesalers. He puts his money on the line and buys the stock for resale as quickly as he can through his own salesmen to his own customers, and through dealers and their salesmen to their customers.

Q. Is there any differential between the price which the underwriter pays the seller and the price at which the underwriter offers the stock to the public?

A. Yes, there is a differential which we call in our business the spread.

Q. What is the purpose of the spread?

A. Well, the spread is to pay, one, legal costs——

Q. Those are important?

A. Those are important, and other expenses of the deal, such as printing and blueskying, et cetera.

The spread also takes care of the commissions that we [fol. 2520] have to pay our salesmen and, finally, we hope to make a profit ourselves for the risk that is involved.

Q. How do you determine the amount of the spread?

A. There isn't any one yardstick. Generally speaking, the greater the risk, the greater the spread.

Now, remember that we are sending a salesman out to sell this stock. The salesman lives and supports his family on what he can sell, and the more difficult the deal, the bigger spread, the bigger part of the spread you have got to give him or larger commission to sell it.

Q. What factors are considered by the underwriter in pricing a secondary offering?

A. Well, the first factor would be the general condition of the securities markets.

Then he looks into the particular industry that the company is in, and then he looks at the company itself and its past record, at its dividend policy, at its management, at its future growth possibilities, and then he looks at the amount of stock that is going to be sold, first, the absolute dollar value of the stock and, secondly, its relationship to the amount of stock already outstanding.

Now, having looked at all those factors and possibly some that I have forgotten to enumerate, he arrives at a price.

Q. In the hope that it will be successful?

A. Certainly.

Q. Now, is the underwriter interested in arriving at a price at which the entire offering will be sold?

A. Yes, very much so, because if he was stuck, even with a relatively small percentage of the deal, he could lose not only the profit, but he could also go into his own capital and take a loss.

[fol. 2521] Q. The problem, then, is to find a price at which the demand will equal or exceed the supply, is that correct?

A. That is it exactly.

Q. Would these factors which you have just related be of much assistance to an underwriter seeking to price one of the secondaries which would be made under the Government's proposed decree?

A. No, not necessarily, because, in the first place, these underwriters know the General Motors Corporation and, secondly, they wouldn't tell him anything he didn't know. They wouldn't give him the answer to the $64,000 question,

which is how much below the market would he have to sell the stock.

Q. Can't the underwriter get some help from the study of previous secondary offerings?

A. I don't think so in this case particularly, but even in an ordinary secondary, they are all different. Each one is a little different. If there were some magic by which you could average a series of underwritings, of secondary underwritings, and come up with a price, then the slide rule boys could take over our business and the rest of us who have to use some judgment would go to the side lines. It would be a very simple business on that basis, but it isn't that simple.

Q. There is no experience with a secondary which might be comparable with the problems involved under this decree?

A. We searched diligently, and we couldn't find anything that even remotely approached this. The huge size of the offering, the time element involved, the forced sale element involved, the fact that 43 million shares would be given out in dividends and a great deal of that would be sold for tax purposes or for panic selling, all of these things combine to a completely unique situation in investment history. There has been nothing like it.

[fol. 2522] Q. As an underwriter, Mr. Forgan, where would you look for the demand necessary to take up this increased supply of stock to be offered under the decree?

A. Well, I would know that the only place that you could find that increased demand is through institutional buying.

Q. How would you go about generating demand from that type of buyer?

A. There is only one way I know how to do it, and that is through price, making it low enough and cheap enough so the buyers will come in.

Q. Why do you stress price?

A. Because that is the only mechanism I know to take care of this huge supply of stock which is coming on the market. There isn't any other mechanism I know of that will take care of it.

Q. Would there be any tendency upon the part of the institutional investor to wait, as Mr. Kennedy testified here?

A. Yes, very definitely so. As Mr. Kennedy said, he doesn't have to buy General Motors and if he knew, which he will know, of course, that every year for ten years he is going to have an opportunity to step up on a secondary and buy his portion of 2 million shares, I don't think he would be in any hurry to buy unless he felt that the price was a rock-bottom bargain basement price. Certainly the first issue or the first few issues would have to be at that. If he has a flop there, then the trustee would be in trouble with future issues.

Q. Having these problems that you have related in mind, which you have mentioned in your testimony, have you arrived at a decision as to the price where General Motors stock might attract sufficient buying support from these forced sales?

A. Yes, I have.

Q. What is your conclusion?

[fol. 2523] A. Well, based on the current market conditions, and the current price for General Motors stock, my conclusion is that the stock could only attract the kind of buyer we are talking about at approximately 30 per cent under its present market value, which comes to a price of around $33.00 per share, and a yield of 6 per cent, approximately.

Q. Why do you believe that the stock of General Motors Corporation would find buying support at that level?

A. Well, after all, the decree isn't going to put General Motors out of business. Presumably General Motors will still have the A-1 management which it has always had; will have excellent products; will be the premier company in its field.

There isn't anything in the decree which should hurt the earnings of General Motors or their dividends. So there is some price, and I have estimated it at 6 per cent yield, $33.00 a share, where General Motors is a very good buy.

Q. Now, directing your attention to these offerings which will occur under the proposed Government plan, if the particular offering were not the first under the plan, would you as an underwriter be interested in the success or lack of success of prior offerings under the plan?

A. Very much so. I have just testified that if they have a flop on one of these offerings, the succeeding offerings are going to be much more difficult. In fact, they will probably have to sell at, I wouldn't say "give it away," but

they will have what we call in our business, give away prices.

Q. How quickly after the Government plan became effective would the price of General Motors drop to this figure of about $33?

A. I think almost immediately.

Q. Well, why would that drop take place so fast instead [fol. 2524] of being spread out over the ten years?

A. Well, the stock market discounts the total of the factors involved in any situation. In other words, they would not simply look at the two million shares each year of forced selling or the ten or fifteen million shares over the period that would be sold for taxes; they would consider the whole ball of wax, and having come to that consideration, they would assess it and I think assess it almost immediately, which would bring the stock down to the price I am talking about very quickly.

Q. So do you mean by that, that the first annual offering by the trustee would have to be made at what you call bedrock bargain price which fully discounted the weight of the future offerings?

A. Yes, I do.

Q. Would each annual offering of two million shares have an additional depressing effect upon the price of General Motors stock?

A. Well, I have testified that I think the major part of the impact would come immediately, so that I do not think the additional offerings would have any more of an effect than an ordinary effect of a large secondary, always providing this point, however, because of the forced nature of the sales—the trustee here might have to sell under panicky market conditions, general market conditions; he might not have any control over it, and under that basis, of course, the effect of the sale would be more injurious.

Q. This proposed decree which is before the Court provides that du Pont stockholders, other than restricted stockholders, should be given options to purchase a pro rated share of each of the blocks of stock to be sold annually.

Now, in your opinion, would these options alleviate the adverse market impact of the Government plan?

[fol. 2525] A. Well, I cannot see that they would have any effect. An option at the market price of the stock is obviously worth nothing, and I do not know why anybody would

buy stock from the trustee rather than go to the stock exchange and buy it. As a matter of fact, I think he would be more inclined to go to the stock exchange because I do not know how he would go about buying the stock from the trustee.

There might be a cumbersome mechanism. As far as buying General Motors stock is concerned, all he has got to do is pick up the telephone and he can buy it within thirty seconds on the floor of the Exchange.

Q. Well, assume he chose to buy it from the trustee.

A. Well, even if he chose to buy it from the trustee, that would be subtracting what otherwise would be a demand on the floor of the Exchange, and the imbalance between supply and demand would still exist.

Q. Well, what if the options were offered at a discount, like the pre-emptive rights offering to shareholders in a rights offering?

A. Well, it is pretty hard for me to believe that any Court would differentiate between two types of stockholders of du Pont and provide a windfall for one class of stockholder at the expense of the other class.

Even if that should happen you would only be compounding the confusion because the people who got the windfall would rush right in, exercise their rights and dump their stock on the market and the market would go right down to whatever the offering price was.

Q. In your opinion then these forced sales could not be handled by a rights offering?

A. No. You cannot confuse a rights and a secondary offering.

Q. Mr. Forgan, would the Government decree, if adopted, [fol. 2526] affect the ability of General Motors to raise equity capital through the issuance of common stock during the ten-year period?

A. Yes, I think it would.

Q. Will you explain that?

A. Well, any new shares of newly issued General Motors stock would have to compete not only with the forced sales but with the sales for tax purposes and with a steady flow, I think, of General Motors stock, and, therefore, I think that the price that that stock could be underwritten at would be so injurious and so low that the company would be ill advised to use that form of financing.

Q. Would an underwriter, such as yourself, in your opinion be willing to participate in a General Motors rights offering during the period the Government plan for divestiture was in effect?

A. I do not think you could get an underwriting group together, and mind you it would have to be a big one, to underwrite that offering unless, first, you had the agreement of the trustee not to sell during the standby period, which is usually two weeks and, secondly, that it was offered at such a price that the underwriters would consider that the price took care of the obvious risk here of unregulated sales during the time of their standby.

Q. Would you as an underwriter recommend to General Motors that it attempt to raise equity capital through this method?

A. No, except under circumstances that I cannot possibly foresee. Dire circumstances of some kind might come along where they would have to do it, but generally speaking I would say no.

Q. Well, what sort of a discount might be necessary or likely in the event of such a rights offering by General Motors?

A. Well, I cannot answer that question except to say [fol. 2527] that the discount would be considerably larger than it would be under normal conditions.

Q. All right. One final question: Might the impact of the Government decree be alleviated or softened if the proposed sale of the twenty million shares were supervised or administered by a financial expert?

A. No. I have been assuming throughout my testimony here that the trustee would do as good a job as was humanly possible to do and that he would have the benefit of the best financial brains he could find in the country to advise him.

Mr. Tierney: Take the witness.

Cross-Examination.

By Mr. Reycraft:

Q. Mr. Forgan, when did you begin your study for General Motors in connection with your testimony in this case?

A. In the Fall of '57.

Q. And what type of study did you undertake, sir?

A. Well, we have made a great many studies. We made one basic study on the effect of this decree on the market for General Motors stock.

Q. And will you describe the nature of that study?

A. Yes. We looked into tax angles. We, as I testified before, tried our best to find something to compare this with, without any luck.

We looked at the vast flow of stock that was coming on the market. We looked at the various mechanisms for getting rid of that stock.

We came up with the conclusions which I have outlined here, or maybe I should say more properly, Mr. Reycraft, that I came up with those conclusions, because my testimony is my own.

[fol. 2528] Q. I see. Who, sir, in your firm worked with you on this study?

A. My partner, John Fennelly in Chicago spent a great deal of time on it and we had a team, both in Chicago and in New York, working on this.

Q. And in the course of their study did they prepare charts or tabulations or memoranda which they exchanged with you?

A. Yes.

Q. Do you have those available, sir?

A. No, I have not.

Q. Are they in existence?

A. Yes.

Q. May we examine them?

A. Well, these we have gotten up for the General Motors attorneys. I do not know——

Mr. Tierney: If the Court please, these are work papers and we object to the production by this witness of them. Here he is as our expert. He was retained to be a witness in this case. The work papers that he has given us are part of the preparation of his testimony.

We object to the production of them.

Mr. Reycraft: He has expressed, your Honor, some fairly far-reaching opinions with respect to the study he made. I think we should be permitted to examine into the basis for his opinions.

He has said that there are charts in existence and there are memoranda which have been prepared by his firm in connection with this testimony.

I respectfully request, your Honor, that we be permitted to examine them.

Mr. Tierney: If the Court please, consistent with the ruling heretofore, these are work papers that——

Mr. Reycraft: We have been permitted to examine them. [fol. 2529] Mr. Tierney: He was retained to be a witness here and these communications between us, the papers between lawyers, were furnished, as he said, to lawyers, and we think they are privileged.

The witness is here. You can cross examine him.

The Court: Oh, I think he is entitled to see those, Mr. Tierney.

Mr. Reycraft: Your Honor,——

By Mr. Reycraft:

Q. Well, are they here in Chicago, Mr. Forgan?

A. I think some of them are.

Mr. Reycraft: Your Honor, I would be glad to—in fact, I will continue my cross-examination, but I think in order to complete it I should like to examine those papers.

The Court: Do you have them here?

Mr. Tierney: No, your Honor.

The Court: Are they at your office?

Mr. Tierney: I think there are probably some in the office.

The Court: Well, I think Counsel should be permitted to examine them.

Mr. Reycraft: Under the circumstances, your Honor, I have just a few more questions, and then we would like to continue tomorrow.

By Mr. Reycraft:

Q. Mr. Forgan, can you tell me, sir, what factors went into your estimate that there would be required to be a 30 per cent price under the market in order to move the Gen- [fol. 2530] eral Motors stock? Now, I realize that you have testified you examined the Government's proposed judgment, and that you have assumed it to be a fact that in addi-

tion to the two million shares a year which the trustee would sell there would be one to one and a half million shares a year sold for various reasons.

Can you tell me, sir, how you get from those figures to your percentage estimate?

A. Well, I estimated that based on the whole situation—the first thing I went to is the fact there are 63 million shares going out of one hand where, for forty years, the markets have known that that was going to stay put right where it was. That was a first and a very important factor.

Now, the other factors that you enumerated are all part of the jigsaw puzzle.

Q. Well, sir, let me ask you this: what was the last secondary distribution in which your firm participated as a manager or co-manager?

A. The last one?

Q. Yes, sir.

A. I thought you might ask me something about it. I brought with me some names. Can I look at them?

Q. Yes. Please do so.

A. Shall I give you the last five or six?

Q. Yes, sir, please do so.

A. These were all done in '58.

Union Tank Car Company, Champion Spark Plug Company, Chemtron Corporation, Trayer Coal Company, Colonial Sand & Stone Company, and Allied Stores Corporation.

Q. And in terms of the dollar value of the stock, what is the largest dollar amount you have there?

[fol. 2531] Mr. Tierney: I do not think he has the dollar amounts.

By Mr. Reycraft:

Q. Do you recall, sir, if you do not have the figures there, what the dollar amount of the largest secondary was?

A. Well, I am sorry to say that what I have here are our own participations. I would say that of those that I have mentioned the Champion Spark Plug deal was the largest. All I have here is what we had of it, which is $827,400.00.

Oh, excuse me, I am sorry. 827,400 shares.

Q. Now, is that your participation, or is that the total?

A. No, that is the deal.

Q. Do you know what the price of that stock was when it was sold? What was the offering price?

A. I think the offering price was just a little under 30.

Q. Was the offering price at the market?

A. No, there wasn't any market.

Q. Was this a new public offering?

A. This was a new offering from the family who owned the company.

Q. And there was no previous market for it?

A. No previous market.

Q. As to the next largest issue there for which there was a previous market, can you give me the dollar value or the number of shares?

A. I don't know, because I don't know markets on these, as to which was the next largest.

We sold in July, 90,000 shares of Union Tank Car, which we headed, and that price was about $34 a share, I think—$34 or $35.

[fol. 2532] Q. Now that Union Tank Car issue, that 90,000 shares, is that the total issue; that is not just your participation?

A. No, but I think—no, we had some partners in this. No. That was the total amount sold, yes.

Q. So that would run to a little over $3 million for the whole secondary, is that correct?

A. Yes.

Q. And did you fix the price, or was the offering price of that secondary at the market?

A. Yes, approximately at the market. Very close to it. It might have been a quarter or a half under—I don't know the exact price. I don't remember the exact price.

Q. Now, as to any of the secondaries as to which you have just referred from your notes, can you tell me whether any of them sold below the market?

A. Well, now, it depends upon what you mean by "below the market."

You see, most of these secondaries are entered into after the close of the market, and it depends upon your feel of the situation. You may do it at the last sale, or you may

do it at the bid price, or at the offering price; or if you are worried, you may do it under the bid price.

I can't give you the exact prices on these; I didn't bring them with me.

Q. You don't know whether any of these secondaries were offered at the closing price, at the last bid, or you don't know what price they were offered at?

A. No, I can't answer that for you.

Q. Do you recall any secondary with which your firm has been connected, and in particular any which you have managed, which you have offered for as much as one point below the closing price on the New York Stock Exchange? [fol. 2533] A. I can't recall it offhand, but I am not sure that we haven't; I would have to go through all these and find out exactly what the situation was. And I didn't try to do that.

Q. You don't know of any?

A. No, I don't

Q. With respect to the secondaries you have referred to from your notes, can you tell me whether, in your opinion, there was a depressing effect or price impact on the market price of those stocks?

A. I am afraid I can't answer that. As far as Champion is concerned, which is the largest one, there was no market to have a depressant effect on.

Q. As to the others, you don't know——

A. As to the others, Union Tank, for instance, we sold it one afternoon; it was only 90,000 shares, and it wasn't a very big sale, and I don't think it had any effect on the market.

Q. Only 90,000 shares; about $3 million worth?

A. Yes.

Q. Have you made any study, sir, of the price impact of secondary distributions on the market?

A. Yes, to some extent we did that.

Q. Will you describe that study?

A. Well, we looked—as I told you before, Mr. Reycraft, we tried to find something here to compare this with, and we couldn't find it. Now, you can get all the figures you want on price impacts of secondaries. You ought to weigh them for what the general market is doing at the time, and I don't know how you do that. But there is no question

that large secondaries have some effect. I can't tell you how much. But there isn't any secondary here that helps you, at least helps me, in my consideration of this one iota.

Q. Did your firm participate in the first Ford offering?

A. Yes.

[fol. 2534] Q. What was the percentage of your participation, if you recall?

A. I don't recall. We were one of the major participants.

Q. You were not one of the seven co-managers?

A. No, we were not.

Q. Were you on the next level?

A. Yes. We were called "majors."

Q. That would be a major——

A. Yes.

Q. Now, to what extent did your firm or was your firm consulted with respect to pricing of that issue of stock?

A. In my memory—and this is memory—there was a great deal of conversation, obviously, about pricing of that stock; and I believe that Blyth & Company—in fact, I am very sure of this—called us on the phone and asked us to give them our ideas on price.

The difficulty with that situation from an investment banker's standpoint, was that there was such a demand for stock, it was hard to divorce your judgment from the demand. In other words, the stock could have been sold two or three points higher, in my opinion.

Q. What price did your firm recommend to Blyth and Company when you were asked?

A. It was a good bit lower price than what it came out at. I cannot tell you the exact price.

Q. What study did you make in connection with that recommendation?

A. We studied the Red Herring prospectus, which is what we had, which told us the story of the Ford Motor Car Company, which is the story you know which had never been told before. We studied that very carefully, together [fol. 2535] with the registration statement and compared it, obviously, with the other automobile companies.

Q. This was an offering of 10,200,000 shares. What previous experience did you think was relevant in considering what price you think should be set for that stock?

A. Well, the obvious previous experience would be to consider the Ford Motor Car Company, compared pri-

marily with General Motors and Chrysler and the price at which those stocks were selling.

Q. You compared the price-earnings ratio?

A. Yes.

Q. The yields?

A. Yes.

Q. And where did you place Ford stock with respect to the other two automobile companies?

A. I don't understand that question.

Q. Well, I assume that you got some figure for General Motors price—earnings ratio; you got another figure for Chrysler price-earnings ratio?

A. Right.

Q. And that it required some judgment for you to place Ford in relation to those two stocks?

A. That is right.

Q. Now can you tell me, sir, where you placed Ford in relation to those two stocks?

A. You mean in price?

Q. Price-earnings ratio. I am interested in how you got to the price you recommended.

A. I am afraid I can't give you the price-earnings ratio. That deal was some years ago, I don't really remember it.

Q. Would it be correct to say that you placed Ford somewhere in between the two companies, between General Motors and Chrysler, as to how you thought the market would appraise the yield on that stock?

A. It seems to me that would be the obvious place to put [fol. 2536] them, between the two big ones; but I don't say we did, because I cannot remember the exact figures at that time.

Q. Of course my purpose in asking you these questions is that the Ford issue was quite a large issue of stock——

A. That is correct.

Q. (Continuing)—for which, as I understand it, there was no precedent, and I am trying to ascertain what factors you, as an investment banker, took into account in forming the judgment which you apparently expressed to Blyth & Company at that time.

Now do you recall, sir, any other factors which you considered relevant in expressing your opinion?

Mr. Tierney: If the Court please, I object to this as not

proper cross-examination. What he may have expressed to Blyth & Company is immaterial in this cross-examination.

Mr. Reycraft: I don't care whether he explains what he expressed to Blyth & Company, but I think he should say what the basis of his opinion was. This is an issue which he has testified to there was no precedent, and in comparing it I think it is certainly relevant.

The Court: The objection is overruled.

Mr. Tierney: I will ask to have the question reread.

(Question read.)

Mr. Tierney: That is a long, involved question.

The Court: Yes. I think you had better restate it.

By Mr. Reycraft:

Q. Do you recall what factors you considered relevant in forming the opinion which you later had, whether you [fol. 2537] expressed it to anyone or not?

A. Yes, I think I stated those factors. They were the price earnings ratio, the proposed dividend, the yield and there was one factor in that Ford situation which was very hard to appraise.

For example, a fellow gets my theatre tickets for me, just as one example, in New York, calls me on the telephone before anybody knew what the price or anything else was. He said, "I want you to do me a favor." I said, "What is it?" He said, "I promised my wife I would buy her 50 shares of Ford." I said, "Well, do you know what the price is? Because I don't." He said, "I don't care what the price is."

We have all sorts of things of that kind coming into our office. There was a demand for it, because of the magic of the Ford name.

Q. Is your firm one of the majors in the current Ford secondary which has been registered?

A. Yes, we are.

Q. Can you tell me what factors you would consider relevant in pricing that issue of stock?

Mr. Tierney: If the Court please, we have the same problem here now that we had previously, where you have some rulings of the Securities and Exchange Commission

which makes it improper and illegal for one participating in an offering to express any opinions on it.

Mr. Reycraft: I don't wish to embarrass the witness. I don't want to have him drumming up the price of Ford stock, which I understand is what the S.E.C. is concerned about. I am asking him as to the general factors which influence his judgment, and I will try to be careful not to embarrass him.

The Court: He may answer.

[fol. 2538] By the witness:

A. I will have to answer it in generalities.

By Mr. Reycraft:

Q. Please do.

A. I don't want to plead the Fifth Amendment.

Q. If you consider that we are getting onto a dangerous territory——

A. All right, let me see if I can answer it for you.

In the first place, of course, everyone knows that Ford had a very disastrous third quarter last year. And it is also known that the fourth quarter—they came back in good shape. Now we would be very much interested as to what they were currently doing and how their various units were selling. We know something about that, but I don't want to—that is something I can't talk about, as I understand it.

Q. Well, you considered, in general, the earnings of the Ford Motors Company, their sales, their market position; and you made some judgment, I assume, as to what you thought their future market position would be?

A. That is right.

Q. And you would be able to do all these things with respect to General Motors stock, is that correct?

A. You mean in the event of this plan going through?

Q. Well, assume that the plan were to go into effect, or if there were some other better way of doing it, assume that any way that was considered for selling General Motors stock.

Mr. Tierney: I object to the form of that question.

The Court: Sustained.

[fol. 2539] By Mr. Reycraft:

Q. Now limit your answer to the proposed plan.

A. Well, certainly, we can get all the statistical information we want on General Motors, but we cannot evaluate 63 million shares. That is one we can't evaluate on anybody's basis.

Q. Can you evaluate the effects of this sale by the trustee of two million shares in one year?

A. I haven't tried to break this down, Mr. Reycraft. I have looked at the whole situation under the Government plan, and I think anybody who tries to break it down is very foolish. At least, I can't do it.

Q. You did not give any weight to any of the various factors which entered into your judgment?

A. Would you repeat that question?

Q. You did not give any particular weight to the various factors which entered into your judgment?

You stated that you considered the two million shares a year, and you considered that there would be an additional million to a million and a half shares a year sold?

A. That is right.

Q. Now did you give any weight in reaching your 30 per cent as to what part would be attributable to either one of those aspects?

A. No, I didn't.

Q. Do you think there is any way to do that?

A. I don't see any way to do it. One year it might be one possible part of it and another year it might be something else. It depends on general markets. I try to look at it as a whole.

Q. Do you think one year there might be no effect of the two million shares; some other year——

[fol. 2540] A. Oh, no, no. But one year the effect of two million shares might be greater than the effect of the tax selling, and vice versa; and one year there might be a panic selling of that stock which would be more important than either of the other two.

Q. You don't have any way to break down the percentage attributable to either of those factors?

A. I don't. Certainly, I can't.

Q. Can you tell me where you got your 30 per cent?

A. I didn't get the 30 per cent anywhere. That's my judgment of where it will go in this market; where it will attract buying which will put some demand into this market to take care of the huge supply.

Q. Well, it is a relatively simple thing to state in number or percentage to the extent your judgment should be taken into account, and it is relevant, I think, to inquire into the basis for your judgment.

A. Right.

Q. Can you explain in any way how you got to the 30 per cent?

A. Yes, I have already done it, I thought, but I will do it again.

Q. Will you please?

A. I took into account first 63 million shares coming out of one strong hand and going into thousands of weaker hands—Number One. Number Two, I took into account the fact that there were 20 million shares to be sold in a ten-year period under forced sale conditions. Number Three, I took into account the tax selling, which is bound to occur here, in order to pay the additional taxes which the du Pont stockholders get through the distribution of General Motors stock as a dividend. And four and last, I tried to evaluate the panic selling. Maybe that is too strong a word—use any word you like—but the psychological selling which is going to accompany this, and I [fol. 2541] came up with the figure of 30 per cent, or a six per cent yield, a price of around $33 per share.

Q. Did you get this six per cent yield by comparing General Motors stock to any other comparable stocks?

A. I suppose you would have to compare it with the market as a whole.

I am talking about a six per cent yield in this market, the one we are in right now, Mr. Reycraft.

Q. What does Ford stock yield now, do you know?

A. I can't answer that; I don't know.

Q. Do you know what Chrysler yields?

A. No, I don't.

Q. Do you know what American Motors yields?

A. No.

Q. Do you think it would be relevant to compare General Motors' yields with those yields to determine whether

there would be some shifting of investors within the automotive stocks?

A. Normally, I would yes, but not in this case.

You have to throw the rulebook out the window here; this is entirely different.

Q. Do you know of any comparable high grade industrial stocks which sell at a yield of six per cent at the present time?

A. No, I don't think there are any in this market.

Q. Do you know what U. S. Steel yields?

A. No, I can get you all these, but I don't carry them in my head.

Q. I assumed that you would have considered these things in forming your opinion and that you would have measured in some respects the comparative yields of General Motors stock with other stocks?

A. That is correct.

Q. Did you do that?

A. Yes. As a matter of fact, one of the better ways to [fol. 2542] do it would be to compare it with the Dow-Jones averages.

Q. How does it compare in that respect?

A. I can't give you that. I can get all this information for you. I don't try to carry it in my head, Mr. Reycraft.

Q. Do you know how six per cent yield compares with IBM stock?

A. IBM yields practically nothing at the fantastic prices it sells at.

Q. Well, you don't know of any high grade industrial stock which yields six per cent at the present time, do you?

A. No, and I don't know any high grade industrial stock that has got sixty-three million shares coming out on the market either.

Q. If you limited your assumptions to between three and three and a half million shares of General Motors to be sold a year and assume that the trustee has discretion to postpone the sales after the first secondary, do you have any judgment as to what impact that would have on the market?

A. Well, if I understand you, you mean if the trustee made one sale of two million shares, say, the first year, and then didn't sell any for awhile, or what do you mean?

Q. Assume he made the sale subject to the approval of the court and assume—let's limit our discussion to the first year—assume there was a sale of two million shares by the trustee, do you have any judgment as to what the impact would be on the market price?

A. The first year's sale?

Q. Yes, sir.

A. Yes, I don't think he could make that sale at a better price than the six per cent yield.

Q. You think nevertheless—this is somewhat of a change [fol. 2543] in our assumption, but you think despite that it would still be a 30 per cent reduction in price?

A. Yes, I do, to get rid of the stock. You see, what I am trying to do is balance supply and demand, and I think it is a yield like that that will get the big investors in, which you are going to need in this thing. It will have to be such an irresistible price that they can't stay out, and that is what is necessary in this case, in my opinion.

Q. Did you make any study of the Sloan secondary?

A. Yes.

Q. You know what I am talking about?

A. Yes.

Q. What conclusions did you draw with respect to the Sloan secondary?

A. Well, that it had an impact on the market for General Motors stock, but that it was well sold and was a successful offering.

Q. How much of an impact did that have, in your judgment?

A. I can't give it to you percentage-wise. We have some figures on it. I don't have it in my head.

Q. Well, you are not even able to give an estimate of what the impact of that secondary was on the market price of General Motors stock?

A. I don't carry it in my head, Mr. Reycraft.

Q. But you did consider it in forming your opinion?

A. Yes.

Q. To which you have testified here?

A. Yes, sir, we did.

Q. Do you recall whether, in considering that offering, you had an opinion as to the length of time for which that depressing effect continued?

A. No, that is a very hard thing to determine. I don't know. I don't think anybody can tell you exactly that. [fol. 2544] I have heard testimony here in this Court that usually that impact lasts for a couple of weeks or until you get the stock paid for and delivered. I am not sure that I agree with that. It is a very hard thing to know how long an impact lasts.

If, for example, you had not sold the Sloan stock, where would the stock be selling?

I am unable to do that.

Q. You think it is impossible to tell?

A. Well, it is impossible to be completely accurate about it.

Q. I believe you testified a few minutes ago that at the time you were forming your opinion, you did give some consideration to the length of time for which you thought there was a depressing effect? You did give some consideration to it?

A. To the time factor in this?

Q. Yes, sir.

A. Yes, to the 10-year factor, you mean?

Q. No, we are talking about the Sloan secondary now.

A. I don't recall that. I am sorry.

Q. If I have misstated your testimony, I will ask you another question.

A. I don't want to be non-responsive, but I don't understand that question.

Q. Did you, when you were forming your opinion, considering the Sloan secondary, which I believe you testified you did, is that correct? You considered the Sloan secondary?

A. Yes, sir.

Q. When you were considering the Sloan secondary, did you form an opinion as to the length of time the depressing effect of that offering lasted?

A. No, I did not.

Q. You did not form an opinion.

A. No.

Q. Did you try to determine what the length of time was? Did you make any study?

A. No. I wouldn't know how to make a study of what would have happened if you hadn't sold the stock. That is what you mean, isn't it?

[fol. 2545] Q. Well, opinions have been expressed——

A. I know they have.

Q. —as to the degree of impact of that particular secondary on the price of General Motors stock, and I take it that your testimony is then that you wouldn't know how to do that?

A. Not accurately, no.

Q. You don't think there is any way to do it?

Mr. Tierney: I object to that, your Honor.

The Court: Sustained.

By Mr. Reycraft:

Q. Did you consider in forming your opinion the fact that General Motors buys its own stock on the New York Stock Exchange?

A. Yes, I did.

Q. What weight did you give to that factor?

A. Well, the weight I gave to it is that the market that we are talking about at the present time is a market which has it in purchases almost daily of General Motors stock, so that is the market we are talking about introducing these new shares to.

Q. Now, suppose that General Motors should determine to pay its bonuses in newly issued stock rather than buying through the New York Stock Exchange. In your opinion, would this have an effect on the market price of General Motors stock?

A. Yes, because you would be adding to the supply.

Q. Do you have any judgment as to the amount of the effect?

A. No, not any more than I have any judgment as to the exact effect of the present buying. For instance, I don't know how many recipients of that stock turn right around and sell it and I don't know where you would get the figures to find that out.

[fol. 2546] Q. So that in considering this purchasing by General Motors, you reached no conclusion, would that be accurate?

A. No, I wouldn't say that I reached no conclusion. You mean conclusion in what respect?

Q. With respect to the degree of the impact?

A. No, I couldn't measure that.

Q. Again, you think this is impossible to determine?

A. I think it awfully difficult to determine, unless you could find out exactly how much of that stock was sold and made practically a day-to-day study of the transactions. I don't know how you could do it otherwise.

Q. You didn't do that?

A. No, I didn't do that. I considered that that was a part of the market and had been for some years.

Q. And if it stopped being a part of the market, in other words, if General Motors stopped this practice, it would have an effect?

A. Yes, it would.

Q. Downward on the price of General Motors stock?

A. Yes, it certainly would.

Q. But you have no opinion as to how much?

A. No, I can't answer that.

Q. Now, in your testimony to the effect that between a million and a million and a half shares a year would be sold pursuant to tax selling, as I believe you called it, can you tell me how you arrived at that figure?

A. We made a study of the tax impact on the du Pont stockholders, and it was as a result of that study that I came up with a figure of a million to a million and a half shares.

Q. You made a study of what, sir?

A. Of the tax impact.

[fol. 2547] Q. What type of study was that? How did you study the tax impact?

A. This study was prepared by my partner, John Fennelly, who is a trained economist, and what he attempted to do—of course, there are a lot of assumptions in it, there has to be—was to break down the individual stockholders of du Pont in brackets as to the size of their holdings, and after that breakdown to estimate the taxes in those brackets, average tax rate in those brackets.

Q. And you relied on that study in your testimony?

A. Yes, because I felt that it had been very thoroughly done, and that it was as good an estimate as we could find.

Q. Is that study among your work papers?

A. Yes.

Q. Is that in Chicago or in New York, do you know, sir?

A. I don't know at the moment.

Q. Would you find out for us, sir, after court today, how many of these papers are in New York? We would appreciate having them here, if you would make them available.

A. I will try my best to do so.

Q. Would you be able to describe——

Mr. Tierney: What was that last remark you made, Mr. Reycraft?

Mr. Reycraft: I asked him if he would find out where the work papers, whether in Chicago or New York, and if they are in New York, if he will have them sent to Chicago so we may examine them.

Mr. Tierney: You mean tomorrow morning?

Mr. Reycraft: If it is possible; if the witness wants to stay over——

Mr. Tierney: I will tell you it wouldn't be possible to have them here tomorrow morning if they are in New York. [fol. 2548] It ought to be quite obvious to you.

Mr. Reycraft: It is not at all obvious to me.

Mr. Tierney: It is 5:20 in New York now.

Mr. Reycraft: Let's go on.

By Mr. Reycraft:

Q. Mr. Forgan, can you describe any other studies which were conducted at your direction in connection with your testimony?

A. Oh, we looked into all sorts of things. You see, we were working for the General Motors lawyers in this case, and they would call us up and ask us to perform various tasks, which we did. We have been working on it for about a year and a half.

Q. Can you tell me what specific studies you made?

A. Well, no, I can't give you exactly specific studies. They would call us up and ask us to look at the Dow-Jones Averages and give them what they were for the year 1954 or 1955 in relation to General Motors, and things of that kind, and I can't remember all of it. This was going on steadily.

Q. Did Mr. Fennelly do a substantial amount of this work in connection with your preparation?

A. Yes, he did.

Q. Would he know what these studies were?

A. Well, he would know them—we both—I, in effect,

supervised this thing, but John Fennelly did most of the leg work on it, if you want to put it that way.

Q. But the only specific study you recall is this tax study which Mr. Fennelly did, is that correct?

A. Well, and a general overall report, which I testified to before.

Q. There was a general overall report?

A. That is correct.

[fol. 2549] Q. I assume that was based on sub-studies which were made under your direction in connection with the preparation of the report?

A. Correct.

Q. Now, can you tell me what any of those specific sub-studies were?

A. Well, for example, I think in that report there were some studies of the Sloan secondary. I don't remember in the report, the main report—we did make a study of Aluminium secondaries. I don't know whether that is in the report or not. I would have to take a look at the report. I haven't looked at it in some days now.

Q. Did you make any study of the General Motors bonus purchases?

A. Yes, we knew of them.

Q. Well, did you make any study of them?

A. I don't know what there is to study.

Mr. Tierney: What do you mean?

The Witness: We know how many shares they bought. I think we have got those figures in the office, for the last five or ten years.

By Mr. Reycraft:

Q. You didn't try to make any computations to determine what the percentage of the impact was or what variations in the buying, what effect that might have on the market price?

A. No.

Q. What other secondaries, what other factors were made the subject of sub-studies in connection with your memorandum?

A. I don't understand the question.

Q. You testified you made studies as to the Sloan Offering, the Aluminium, and the General Motors bonus purchases?

A. Yes.

Q. Do you recall anything else?

[fol. 2550-2551] A. Well, I am sure there were other studies made, but I can't remember what they were.

Mr. Reycraft: Your Honor, I request that we be permitted to defer further examination until we examine the work papers.

The Court: Very well.

(Whereupon an adjournment was taken in the trial of the above-captioned matter until the following morning, Tuesday, March 31, 1959, at 10:15 o'clock, a.m.)

[fol. 2552]

Transcript of Proceedings of March 31, 1959

The Clerk: Case on trial.

The Court: Proceed, Counsel.

James Russell Forgan, called as a witness on behalf of General Motors Corporation, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination.—(continued)

Mr. Reycraft: Your Honor, yesterday Mr. Gribbon offered du Pont Exhibits 1, 2, 4, 5, 37 and 47. We have no objection.

The Court: They are received.

(Said documents, so offered and received in evidence, were marked Defendant du Pont Exhibits 1, 2, 4, 5, 37 and 47.)

Mr. Reycraft: I might say also, when Mr. Lenz was here on cross-examination, he identified and stated that he was satisfied that the figures were accurate on Government Exhibit 541 for identification, which was not offered.

I would like to offer that exhibit at this time, if there is no objection.

The Court: Is there any objection?

Mr. Tierney: Is that the ad in the newspaper?

Mr. Reycraft: Yes.

Mr. Cox: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 541.)

By Mr. Reycraft:

Q. Mr. Forgan, I have been furnished two memoranda which have been described as being work papers which you [fol. 2553] used in preparation with your testimony in connection with this case. Are you familiar with these two memoranda?

Mr. Tierney: If the Court please, I would suggest that they be marked with numbers, Government numbers, so we know what we are talking about.

Mr. Reycraft: I don't see any necessity for that. These are merely work papers of the witness.

Mr. Tierney: I would like to have them marked.

These are papers we turned over, and I would like to have an exhibit number on them.

The Court: I think they should have an exhibit number, Counsel.

(Thereupon said documents were marked Government Exhibits 542 and 543, for identification, respectively.)

The Witness: May I see them?

Mr. Reycraft: Yes.

By Mr. Reycraft:

Q. Mr. Forgan, do you have with you a copy of a memorandum which has on the first page the title "Estimate of Taxes under the Proposed Government Decree on Individual Shareholders of du Pont"?

A. Yes.

Q. And you have a copy of the memorandum headed "An Analysis of the Proposed Final Judgment of the Department of Justice to Implement the Decision of the United

States Supreme Court in United States vs. E. I. du Pont de Nemours et al."?

A. Yes.

Mr. Burnham: Will you state for the record the numbers that those were marked?

Mr. Reycraft: The first is Exhibit 542, and the second is Exhibit 543.

[fol. 2554] Mr. Burnham: Government Exhibits for identification?

Mr. Reycraft: For identification.

By Mr. Reycraft:

Q. Mr. Forgan, did you prepare any other work papers in connection with your testimony?

A. These papers were prepared by my partner, Mr. John Fennelly, and in each case forwarded to me for comments in New York, and I, in effect, supervised his work, but the work is his.

Q. They are not your memoranda, is that correct?

A. They are not mine.

Q. Did you or Mr. Fennelly prepare any other work papers in connection with your testimony?

A. Well, those papers embody everything that I have testified to. Now, there were all sorts of work papers prepared at the request of the General Motors lawyers which I never even saw.

Q. Who prepared those, your partner?

A. Mr. Fennelly and members of his staff.

Q. Do you know where they are located?

A. No, I don't. They probably, or they may be in the Chicago office.

We searched diligently last night, but Mr. Fennelly is away, and we couldn't reach him. We had to get his secretary downtown, and she was unable to find anything except those papers which, as I say, cover my testimony.

Q. Do you know whether there are any other papers in your New York office which you used in connection with your testimony?

A. Nothing that would be of any value to this; just these particular drafts.

Q. Mr. Tierney said yesterday, I believe, that some of these papers might be in New York. Did you make any effort to check with your New York office?

A. The New York office was closed.

[fol. 2555] Q. So you made no effort to check with the New York office?

A. No, I didn't. But I know pretty well what is there, simply a series of these drafts, which started sometime ago, of the main document.

Q. Did Mr. Fennelly make a survey of the stockholders of du Pont to determine the tax situation of these stockholders?

A. Yes, he did.

Q. Are you basing your testimony in part on that survey?

A. Yes, in part.

Q. Can you tell me how that survey was made?

A. I don't know that I can give it to you in great detail. He had the benefit of advice from both the First National Bank and the Continental Bank of Chicago. He discussed with one of the largest brokerage firms the percentage of stock which they carry in their own name, which is owned by individuals. Of course, he had the breakdown of the figures from du Pont.

Q. Does he have any work papers or do you know of any work papers which show the results of his contact with these banks?

A. No, I have never seen those.

Q. Do you know how he came to the conclusions he has come to here with respect to the tax on each bracket of these stockholders?

A. Well, he had to make some assumptions. The assumptions are all in the documents.

Q. Do you know what the assumptions are?

Mr. Tierney: Which document do you refer to?

Mr. Reycraft: Exhibit 542.

The Witness: Which document is that?

Mr. Reycraft: 542.

The Witness: I don't know it by number, I am sorry.

[fol. 2556] Mr. Reycraft: Pardon me. It is the short tax memorandum.

Mr. Cox: Mr. Reycraft, if it is not too much trouble, could we have the dates on the documents? We can't follow this.

Mr. Reycraft: They are undated, I am sorry to say. I would be glad to have the date, if there is one.

Mr. Cox: Are they both the same as far as the title?

Mr. Reycraft: No.

Mr. Cox: It is a little hard for us to follow the testimony if we don't have copies.

Mr. Tierney: We will give you copies.

By Mr. Reycraft:

Q. Mr. Forgan, will you refer to Page 4?

A. I have it right here.

Q. On Page 4 of Government exhibit for identification No. 542, the statement appears:

> "We believe it reasonable to assume that any person who owns more than 200 shares of du Pont will be in a tax bracket at least as high as 50 per cent, and anyone owning 500 shares will be in a 70 per cent bracket or higher, and anyone owning 1,000 shares will be in a top bracket of 87 per cent."

Can you tell me how you and Mr. Fennelly reached this conclusion?

A. Well, it was his conclusion with which I concur. It is an assumption. You have got to assume something, and I assume that anybody who has got enough money to own a thousand shares of du Pont stock at $211 a share is a pretty rich man, and therefore, would be in the top tax bracket.

Q. You made no effort to conduct a sampling study or [fol. 2557] a survey of the stockholders?

A. No. I don't believe that was done. He handled it, but I am very sure we did not make a sampling study, such as they did in the National Analysts case.

Q. So that this represents nothing more than Mr. Fennelly's opinion based on whatever knowledge he has?

A. That is right.

Q. Which does not include any specific knowledge with respect to individual shareholders in du Pont, is that correct?

A. That is correct.

Q. On the next page, Page 5 of this memorandum, the first full sentence says, "First we must add about 95 per cent of the shares listed in broker's names or a total of 844,999 shares."

Now, that sentence indicates in the context of the memorandum that these shares are being added to the number of shares held by individuals.

Can you tell me what this estimate is based on?

A. It was based on a conversation—I believe it was with Merrill, Lynch, Pierce, Fenner and Beane, who are the largest brokerage house. It was an average which they got up for us from their stock holdings.

Q. They got up some figures for you which purport to show this conclusion which you reached here?

A. Yes.

Q. Can you tell me where those figures are?

A. I haven't the slightest idea.

Q. Were they sent to you by letter?

A. No.

Q. Did you receive them on the telephone, or how?

A. No. I simply accepted them. I accepted them when my partner told me.

Q. You don't know how your partner got the figures?

A. He got them by asking Merrill Lynch what per-
[fol. 2558] centage of stock in their name was owned by individuals, and that is the figure that he got.

Q. Did they tell him over the telephone or did they write him a letter?

A. I don't know.

Q. Who at Merrill Lynch told him?

A. I don't know. I would like to say again, I am not a hundred per cent sure it was Merrill Lynch, but I am almost sure.

Q. In the first full paragraph on page 5 the sentence appears: "Thus we estimate that out of the total of nine million, nine hundred fifteen thousand, three hundred eighteen shares registered in the names of banks or their nominees, 7,932,254 shares or 80 per cent are held beneficially for individuals."

Can you tell me where this information came from?

A. He discussed this with both the First National Bank of Chicago and the Continental Illinois Bank, and it was based on their averages primarily that he arrived at that figure.

Q. Did these banks furnish to your partner a written summary or any sort of breakdown of their stockholders?

A. I cannot answer that. I don't know.

Q. But you are satisfied that these figures are based on information which these two banks furnished to him?

A. Yes.

Q. And you do not know in what form it was furnished?

A. No, I don't.

Q. On Page 6 the sentence appears: "Of this total we estimate—" that is, the total of shares held in the trust—"we estimate that 90 per cent is held for individual beneficiaries or 5,450,000 shares."

Can you tell me where this information came from?

[fol. 2559] A. That was based on information which he received from the two banks, the two Chicago banks.

Q. And is that information available?

A. Well, I do not know where it is, as I have told you, Mr. Reycraft.

Q. And the sentence follows: "Of the latter figure we believe that at least 80 per cent or 4,360,024 shares are held for individuals with a beneficial ownership of more than 200 shares each."

Is this information from the same source?

A. Well, there is a footnote. Do you want to read that or shall I read it?

Q. Well, will you examine the footnote and see if you can answer my question by refreshing your recollection?

A. Yes. It is based on information furnished by du Pont Company.

Q. Is that information in evidence now, do you know, sir?

A. I do not know, Mr. Reycraft.

Q. Do you have the information which du Pont furnished to you in written form?

A. I do not have it, no.

Q. Does your partner have it?

A. I do not know that he has.

Q. Based on these foregoing figures, you arrived at the totals which are set forth on Page 7, is that correct?

A. That is correct.

Q. Do you have any other basis for these figures other than the information which is set forth in the preceding pages?

A. No. That is the basis for them.

Q. Referring to Government's Exhibit 543 for identification, which I might add bears the words "Final Draft" on the bottom——

Mr. Reycraft: Mr. Tierney, can you give us a date for these drafts?

[fol. 2560] Mr. Tierney: I think so. About March 5th.

Mr. Reycraft: March 5th?

Mr. Tierney: 1959.

By Mr. Reycraft:

Q. Referring to the first page of this memorandum, Mr. Forgan, can you tell me what the limitations were on your assignment by General Motors in connection with your testimony in this case?

A. My own personal limitations?

Q. The limitations of your firm?

A. Well, I do not quite understand the question.

Q. Well, what was the scope of your assignment?

A. As I testified yesterday, as an underwriter, to examine the effect of the proposed decree on General Motors stock and also to give an opinion as to the ability of General Motors to raise equity capital during the life of the decree.

Now, in addition to that, and I forgot it yesterday, frankly, we were also asked to give our opinion as to the effects—possibly effects on the economy as a whole.

Q. And the last sentence on this page reads:

> "We understand it is not part of our assignment to suggest any alterations in the Government proposal or to recommend any alternative plans for implementing the decree."

A. That is correct.

Q. That was a limitation on your assignment?

A. Yes.

Q. So you did not in fact suggest any alterations nor did you recommend any alternative plans?

A. That is correct.

Q. Can you tell me sir, referring to Page 7 of this memorandum, what your understanding is of the tax im-

[fol. 2561] pact of the Government's proposed final judgment on the shareholders of open end investment trusts?

Mr. Tierney: Mr. Reycraft, may I ask the purpose of this? Are you trying to find out what is in this report, or are you trying to find out what his estimate is?

Mr. Reycraft: I am trying to find out what the witness based his testimony on.

Mr. Tierney: Well, he testified. He testified from his recollection. I want to know whether you are attempting to lay a foundation for impeachment, or what this is.

Mr. Reycraft: No, I am just trying to find out the basis for the witness' opinion.

Mr. Cox: I read the transcript yesterday. I did not find any opinion on the tax impact on open end investment trusts.

By Mr. Reycraft:

Q. Mr. Forgan, in reaching the opinion which you expressed here yesterday, did you give any consideration to the tax impact on open end investment trusts?

A. Well, I have naturally gone over this report and it is a part of the report. So to that extent.

Q. You gave some consideration to it, did you not?

A. Yes.

Q. What weight did you give it in your considerations? How did it affect your conclusion?

A. Well, I cannot give you the exact percentage of pinpoint weight on it. It is just a part of the whole picture.

Q. Well, can you tell me what relevance in your judgment this factor had on the opinion which you expressed?

[fol. 2562] Mr. Tierney: If the Court please, he did not express any opinion on this.

Mr. Reycraft: He expressed an opinion to the effect there would be a 30 per cent market impact, and he has testified this morning that he took into consideration in forming his opinion the tax impact on open end investment trusts——

By Mr. Reycraft:

Q. Is that correct, sir?

A. Yes.

Q. Well, can you tell me, sir, in taking this into consideration, what aspects of the open end trust did you consider to be relevant?

A. Well, the fact that they passed the dividends through and, therefore, the stockholder of the investment trust pays a tax on those dividends just as though he were a du Pont stockholder.

Q. The distributee pays a tax just as though he were a du Pont stockholder?

A. As I understand it, yes.

Q. And it is your understanding they are required to pass through the stock?

A. Yes, that is. That is a part of the investment company law or act, I believe.

Q. You expressed, or the memorandum indicates on Page 11, "du Pont's low dividend yield of 3.1 per cent and high priced earnings ratio of 30 make it particularly suitable for large investors who are more interested in growth characteristics than in dividend yield."

Now, you testified yesterday, I believe, that in your opinion General Motors would be attractive to investors only at a yield of 6 per cent if the Government's proposal should be adopted.

Can you explain the discrepancy between the yields for du Pont and the yields for General Motors which you would [fol. 2563] consider to be attractive to investors?

A. I think I can explain that quite easily.

Mr. Burnham: I object. There is no discrepancy shown and there is no foundation for such a question.

Mr. Reycraft: I do not mean to suggest that the witness is not being consistent in his testimony. It seems to me that logically there is some inconsistency between saying that du Pont is an attractive buy at 3 per cent and General Motors is only attractive at 6 per cent.

Mr. Burnham: Then, your Honor, it is way beyond the scope of the direct because he was asked yesterday about General Motors stock under this decree. Mr. Reycraft now is asking him about du Pont stock as a general investment.

I think it is way beyond the scope of the direct and certainly he should not use the memorandum as if he were trying to impeach the witness.

Mr. Reycraft: I am not trying to impeach the witness.

I am trying to find out what the basis of his opinion is.

The Court: Well, he may answer.

By the Witness:

A. Well, it seems to me the difference is quite obvious. What I testified to, as an underwriter—I would like to get back to that, Mr. Reycraft, that the price at which you could form a group to market a lot of General Motors stock in the face of this decree, in the face of all the terrible things that happened under this decree—now, my partner says here that du Pont stock is attractive as a purchase for people who are looking for growth situations.

Why does he say that? He is not talking about the du [fol. 2564] Pont stock under the decree, he is talking about du Pont stock as it stands now. He says it is an attractive purchase because of the fact that you have there—he does not say this, but this is what he means—the greatest chemical company in the world with tremendous growth possibilities owning a large segment of the biggest manufacturing company in the world.

That is why he thinks it is an attractive buy.

Q. What do you think?

A. Well, I think the whole market is too high, if you ask my professional opinion.

Q. Do you think that institutional investors would find General Motors attractive under any circumstances at yields of less than 6 per cent?

A. Well, I can't say that somebody might not buy it at a yield of 5 per cent. What I did say was to attract enough demand to take care of this huge supply that is being thrown at the market, it would have to be 6 per cent.

Q. To what extent did you take into account in forming your opinion the view you just expressed that the whole market is too high?

A. I don't understand that question.

Q. Well, the question is, without any decree, in your opinion there is little demand. Is it correct to say, in your opinion, there is little demand for General Motors at the present price?

A. Little demand?

Q. Yes, sir.

A. No, I think it is trading about the average that it has been trading.

I haven't looked those figures up, but I assume that is the case.

Q. But you do think that du Pont is attractive to large investors at 3 per cent, and General Motors would not be attractive at a yield of less than 6 per cent?

[fol. 2565] Mr. Cox: I object to the form of that question, unless Mr. Reycraft explains to the witness whether he is asking about the situation with or without the Government plan. They are two different situations.

The Court: Do you wish to amend the question?

Mr. Reycraft: Yes.

By Mr. Reycraft:

Q. Will you state your opinion, in the absence of the Government's plan?

A. The absence of the Government plan from what, Mr. Reycraft?

Mr. Reycraft: Will the reporter please read the question.

(Question read.)

The Court: I think you had better restate it.

By Mr. Reycraft:

Q. Your conclusion is, as I understand it, that you think that du Pont is an attractive purchase at a yield of 3.1 per cent, and you think that General Motors would not be an attractive purchase at less than 6 per cent?

Mr. Cox: I object, if your Honor please. He is doing the same thing again.

The Court: Sustained.

By Mr. Reycraft:

Q. Can you answer the question, assuming there is no decree?

A. I wish you would state it again. You have got me confused here.

Mr. Cowen: The witness's testimony was based only as to if there was such a decree, not if there wasn't a decree.

I can't see that the question has any similarity to what was testified to.

[fol. 2566] Mr. Reycraft: I will go on to another subject.

By Mr. Reycraft:

Q. Also on page 11 of the memorandum, the memorandum states:

> "We believe it is reasonable to assume that any person who owns more than 200 shares of du Pont will be in a tax bracket at least as high as 50 per cent."

I assume that each of the tax brackets which are set forth here are based on the same information which you previously testified Mr. Fennelly compiled from the sources you have indicated?

A. That is correct.

Q. And there is no other source of this information.

On page 13, the footnote indicates:

> "The First National Bank of Chicago and the Continental Illinois National Bank and Trust Company have furnished to your firm a breakdown of the ownership of the combined total of 200,065 shares of du Pont registered in their nominee names, and also that some additional information has been furnished with respect to these accounts."

Can you tell me in what form that information was furnished?

A. No, I cannot.

Q. Can you tell me what the source of the information in the last sentence on page 13 is? The sentence begins,

> "Since about 92 per cent of the 160,295 shares are taxable directly to individual beneficiaries, and only 8 per cent to the corpus of the trust, we have assumed for purposes of this study that the tax impact on all such shares would be the same as if they were all owned directly by individuals."

Can you tell me what the source of that information is?

A. Same two banks.

[fol. 2567] Q. Same two banks.

The memorandum also indicates that you or your partner gave some consideration to tax avoidance methods which be followed by du Pont stockholders.

A. Yes.

Q. Can you tell me what method of tax avoidance you considered?

A. The main method would be——

Mr. Tierney: If the Court please, for the record, I object to this as not cross examination. We did not go into that on the direct examination, and if the witness—if the lawyer is attempting to lay a foundation for impeachment, he had better do it the right way.

Mr. Reycraft: I am not doing that; I am trying to find the basis of his opinion.

Mr. Tierney: The basis of what opinion? The opinion in this, or the opinion that he testified?

Mr. Reycraft: The 30 per cent market impact. He has testified that his opinion is based on these two memoranda prepared by his own partner.

Mr. Tierney: He has expressed his opinion here perfectly properly and if you examined him properly, I would not object.

The Court: Overruled. He may answer.

By the Witness:

A. Do you mind giving me the page number, please?

By Mr. Reycraft:

Q. Would you state the methods of tax avoidance—is the phrase which is used in your memorandum—the methods of tax avoidance which were considered by you and Mr. [fol. 2568] Fennelly in forming the opinion you have expressed here?

Mr. Cox: I think the witness asked for the page number.

Mr. Reycraft: Pardon me. Page 21.

Mr. Tierney: What language are you referring to, Mr. Reycraft?

Mr. Reycraft: The first full sentence.

Mr. Tierney: Will you read it, please?

By Mr. Reycraft:

Q. (Reading):

"Such tax avoidance might be sought by groups of individual stockholders by exchanging their du Pont shares for shares of properly established holding corporations."

A. Well, I am not a tax expert, but it is my understanding that if a large du Pont stockholder wanted to form a holding corporation, he might avoid tax by depositing his stock there. However, my understanding further is—and I again say I am not a tax expert, because it just isn't that easy; you just don't dump a stock into a holding corporation and forget about it—I think you have to have other income in that holding corporation, which at least equals the dividend income, otherwise you'll be taxed as you would be as an individual.

Now, I want to say this: Although there is nothing in this report that I disagree with, I do not give as much weight, I don't think, in this particular case, as my partner Fennelly did. I don't think that's an important factor.

Q. You don't think that properly established holding corporations have any prospect of tax avoidance by large [fol. 2569] stockholders?

A. Yes, I think they have; and I think that being a very thorough workman, he wanted to bring that point out. But from my own viewpoint, I don't think that it is too important, because—well, frankly, I think the Internal Revenue Department have a way of issuing rules here when you start using these kind of vehicles a little too often.

Q. Did you examine the Internal Revenue rules, sir?

A. No, I did not.

Q. Did you make any effort to determine what the criteria were for establishing a holding company under these circumstances?

A. No. What I gave you is my understanding. I didn't make a study of it.

Q. Now will you refer to pages 22 and 23 of this memorandum, beginning with the sentence on the bottom of the page, "Attempting to take all these diverse influences into account, we conclude that the tax impact of the plan would cause heavy selling of General Motors stock in connection

with each proposed annual distribution of 4,386,538 shares of du Pont stockholders. We estimate that such sales could amount to as much as 25 per cent of the shares distributed or an annual total of about 1,100,000 shares."

Can you tell me, sir, where the figure "25 per cent" was derived?

A. No, I cannot. That was Mr. Fennelly's judgment.

Q. That isn't your judgment?

A. I think I can clear up a lot here, if you let me say something.

Q. Go ahead, sir.

A. I don't disagree with this report; I am very proud of it. I think it is an excellent report. I am delighted to have a partner who is able to write such a good report. He is a trained economist, he was a professor of economics at both [fol. 2570] Princeton and Columbia, he was an economist for the National City Company of New York before he came with us; so I don't disagree with what he has written here. But I am here testifying as to the impact of this plan from an underwriter's standpoint; and when I say I think that the range is a million to a million and one-half shares, I am leaning backwards just as I would be if somebody came to me and said, "Are you going to underwrite this offering of two million shares of stock?"

I don't know whether that explains it or not; but that is the basis of my testimony here.

Q. Well, you have testified, I believe, earlier, that you based your opinion in substantial part upon these two memoranda prepared by your partner, is that correct?

A. Yes, plus thirty years of experience of my own.

These are my thoughts that I am expressing here.

Q. But did you, personally, or did your partner prepare any additional studies other than the two which we are now referring to?

A. Well, this basic document, Mr. Reycraft, was started way back in the Fall of 1957, and we had revisions, and revisions and revisions. The first document, for example—there had been no tax ruling, so that he had to give some consideration to the possibility that the tax ruling would be the opposite of what it was.

I never gave much consideration to that, frankly, because I was pretty sure I knew what the tax ruling was going to be. But he had to.

And if that is what you mean, this thing has been rewritten many times.

Q. I notice on the cover page of this memorandum, it says, "Prepared for General Motors Corporation by Glore, Forgan Company" so that I assume the memorandum had your approval before it went out.

A. Yes, it did.

[fol. 2571] Q. Are you able to answer my question then with respect to the source of the 25 per cent figure on Page 23?

A. That is his judgment. There is no source to it.

Q. Did you include this 25 per cent figure in your 30 per cent? Is this part of your 30 per cent figure?

Mr. Burnham: That is an entirely different figure, Mr. Reycraft, and I think you are fully aware of it.

Mr. Reycraft: Well, I assume he added up his thoughts as to the various aspects of the plan.

Mr. Burnham: If you read that sentence, you will see that it has to do with the volume of selling of General Motors, and the 30 per cent figure Mr. Forgan used had to do with the impact upon the price of General Motors; and they are entirely different.

Mr. Reycraft: You are right. I apologize, sir.

Mr. Burnham: Thank you.

By Mr. Reycraft:

Q. The figure I was thinking about was at the bottom of the page. It says, "It would depress the market for General Motors stock by at least 20 per cent from its present value at $50, and to maintain the market at such depressed levels for many years to come."

Can you tell me the source of that 20 per cent figure?

Mr. Tierney: What page are you on?

Mr. Reycraft: Page 23, at the bottom of the page.

By the Witness:

A. Well, it is Mr. Fennelly's opinion with respect only to the depressing effect on the General Motors stock of the sale of the nineteen and seven-tenths million shares.

[fol. 2572] Now I have testified here before, and I am going to testify again—I told Mr. Fennelly the last time I

discussed this with him; I said, "I cannot—now maybe you are omnipotent, maybe you can break this thing down, but I can't; and my testimony is going to be that there will be a 30 per cent impact, bringing the market down to a 6 per cent yield, taking into consideration the whole ball of wax, not any such segment of it."

Q. But that opinion is based on the studies which were made by your firm in connection with your testimony here?

A. Plus thirty years of experience.

Q. Will you refer to Page 35 of the same memorandum?

A. Yes, sir.

Q. The first full sentence begins, which I will read "Thus we are driven to the conclusion that the initial market impact of the proposed successive annual offerings would not be materially less than that which would occur if the entire 20 million shares were offered at one time. The one great virtue of the latter alternative would be that the shock to the market, while exceedingly violent, would be of short duration, whereas the Government plan would depress the market for ten long years."

Is it then your firm's opinion that offering the entire 20 million shares at one time would have less of an impact than the successive secondaries?

A. What he said is, it would not be materially less than that which would occur if the entire 20 million shares were offered at one time.

Q. Is it your opinion that it would not be materially less?

A. Yes.

If you let me qualify it with one statement—depending [fol. 2573] on market conditions. You can't sell 20 million shares of stock in a depressed market. It is an awful lot of stock.

Q. Is that the qualification you want to add?

A. Yes.

Q. Can you tell me whether you or your firm have made any studies with respect to the marketing problems of offering the entire 20 million shares at one time?

A. No.

Q. You have made no studies?

A. I don't know what study you would make. There it is—it is 20 million shares of stock. You know you would have to get the biggest group ever gotten together in the history of the world, and maybe you could do it.

Q. Page 37 of the same memorandum, the last sentence of the footnote reads, "On April 30, 1956, the effective date of the registration statement, the stock reached a low of 43⅝'s, a decline of more than three points."

This refers to the Sloan secondary?

A. Yes.

Q. Is it your opinion that this decline of three points was attributable to the secondary?

A. Yes, I think it was.

Q. In your opinion, it was?

A. Yes.

Q. Do you have an opinion as to how long that impact lasted?

A. Well, I think you asked me that yesterday. That is an awfully hard question to answer.

Q. I thought you might be able to answer it now by referring to your papers.

A. No. I think Mr. Emerson answered it by saying that he felt the impact of a secondary lasted until delivery date.

Q. And you have no different opinion that that?

A. Well, I am not sure. I am not sure I agree with him.

Q. You don't have an opinion, then?

A. No. I had better say I haven't any opinion. That is better.

Q. But you considered the Sloan secondary in reaching [fol. 2574] the opinion which you expressed here with respect to the market impact of the Government proposal?

A. As I told you, Mr. Reycraft, we looked at a lot of large secondaries to see if we could find one that was even a distant cousin to this situation, and we couldn't find it.

Q. But you considered the Sloan secondary?

A. Sure. We considered lots of them.

Q. Page 38 of the memorandum indicates that in your firm study you considered the Aluminium divestiture?

A. Yes.

Q. Can you tell me how many shares of stock were involved in that particular divestiture?

A. No, I don't have the figures in mind. I can give you the total dollar amounts, roughly.

Q. But you don't know the number of shares?

A. No, I don't.

Q. Do you know the amount of financing, new equity financing Aluminium did during the period of divestiture?

A. I don't know the amounts. There were two secondaries, I believe—I mean, two rights offerings, I believe, during that period.

Q. Do you know whether that divestiture has been completed yet?

A. Yes, it has, I think.

Q. Did you, in forming your opinion with respect to the impact on General Motors financing, did you make any attempt to ascertain what General Motors' needs would be with respect to new equity during the 10-year period?

A. No, I did not.

Q. Do you have an opinion with respect to the ability of General Motors to do debt financing during the period of the 10-year period?

A. Yes, I have.

[fol. 2575] Q. What is that opinion?

A. I don't think they would have any trouble raising money through the debt route.

Q. At reasonable interest rates?

A. Well, as good interest rates as could be obtained depending on the market for interest rates at the time. That is one of the imponderables in this thing, when you start talking about how you are going to finance General Motors over a 10-year period. Supposing they have to pay seven per cent for money.

Q. You don't think they would have any difficulty with debt financing?

A. No, up to a reasonable level, they would not.

Q. Now, on Page 42 of Mr. Fennelly's memorandum, the third full sentence, "If we add to these figures the total estimated taxes payable by du Pont shareholders of 1.02 billions, we arrive at a figure of somewhere between seven billions and eight billions as to the total destruction of values which would be imposed on the shareholders of du Pont and General Motors."

First, let me ask you whether this figure represents your opinion?

A. I have got a very accurate partner, and I have taken what he has figured out here as being correct.

Q. You assume if he said it, it is right?

A. I have assumed if he said it, it is all right.

Mr. Tierney: Will you explain to the witness what totals you are adding there?

Mr. Reycraft: What totals I am adding?

Mr. Tierney: Yes, what you assume in the question. If you add these figures. What figures are you adding?

By Mr. Reycraft:

Q. Will you refer to the memorandum, Mr. Forgan, if you don't recall what went into this computation?

A. I couldn't hear the question?

[fol. 2576] Q. Will you refer to the memorandum, if you don't recall what went into the computation?

A. Yes.

Q. Did you make any estimates of the market value of General Motors stock as of the date of this memorandum, the General Motors stock held by du Pont, the 63 million shares?

A. Of the market value as of the date of that memorandum?

Q. Yes, sir.

A. No, but it is a very easy thing to do.

Q. Do you have a general idea?

A. I don't know what the stock was selling at as of this date.

Q. Well, it would be about $2,800,000,000, something of that nature.

A. I would think so, yes. I think it was over three billion, wasn't it?

Well, I wouldn't know.

Mr. Cox: What stock are we talking about, the 63 million shares——

Mr. Reycraft: Yes.

Mr. Cox: Or all of it?

Mr. Reycraft: 63 million.

By Mr. Reycraft:

Q. I find it difficult to understand the 7 to 8 billion dollar destruction of values in relation to the sale of $3 billion worth of stock. Can you explain to us how this was assumed?

Mr. Tierney: Your Honor, I object to this. This is not cross examination.

Mr. Reycraft: This must have gone into the witness's——

Mr. Tierney: Just a minute. Let me make my statement.

We furnished the Government Mr. Forgan's work papers. [fol. 2577] Now, Mr. Forgan hasn't testified with respect to this subject he is inquiring about, so it can't be cross. If he hasn't any other purpose in using it, it must be for impeachment.

Mr. Reycraft: It is not impeachment.

Mr. Tierney: He hasn't testified, so you can't impeach him about something he hasn't testified about.

Mr. Cox: I have a point of a somewhat different character. I think Mr. Reycraft is examining the witness about a paragraph beginning at the bottom of page 41 of this memorandum, and which goes to the middle of page 42.

I fear this examination will be quite unintelligible in the record unless the text of that paragraph is read into the record so that we know what the witness is being questioned about.

Will you do that, Mr. Reycraft? If you don't, I will be glad to.

Mr. Reycraft: Go ahead, Mr. Cox.

Mr. Cox: The paragraph starts in this way:

"What we have been discussing in these pages is an abrupt destruction of market values of tremendous proportions. In the case of du Pont, we have estimated a probable decline of approximately 30 points—"

The Witness: 50 points.

Mr. Cox: (Continuing)—"points, or a loss in market value for the 45,731,403 shares outstanding of almost $2.3 billion. For General Motors, we have estimated declines of somewhere between 17 and 23 points. This would mean a loss in market value for the 218 million shares owned by the public of a minimum of $3.7 billions and a maximum [fol. 2578] of $5.0 billions. If we add to these figures the total estimated taxes payable by du Pont shareholders of $1.02 billions, we arrive at a figure of somewhere between $7 billions and $8 billions as to the total destruction of values which would be imposed on the shareholders of du Pont and General Motors."

By Mr. Reycraft:

Q. Did you consider this paragraph, Mr. Forgan, in reaching the opinions you have expressed here?

A. I considered the document as a whole in reaching it. This was a part of it.

Q. Including this specific part?

A. Yes.

Mr. Cox: I misread one sentence, if the reporter will correct it. The second sentence in the quotation should read:

"In the case of du Pont, we have estimated a probable decline of approximately 50 points"—I said "30".

Thank you.

By Mr. Reycraft:

Q. Did you rely on the figures set forth in this paragraph in reaching the opinion you have expressed?

Mr. Tierney: What opinion?

Mr. Reycraft: 30 per cent decline in market values.

Mr. Tierney: It has no relation to that.

Mr. Reycraft: I agree, but I think the witness has considered it.

Mr. Tierney: All right.

By the Witness:

A. I would like to repeat that my testimony with regard to the 30 per cent was based on an underwriter trying to [fol. 2579] figure at what price he could get a group together to buy this stock.

Now, the fact that there is a 7 or 8 billion dollar slaughter in market values is a very interesting fact for the Court, but it doesn't help the underwriter any.

Q. You didn't give any consideration to what you determined to be that fact?

A. I don't say I didn't give any consideration because I gave consideration to the document as a whole, but I didn't base the 30 per cent figure on the slaughter of values that would occur here through taxes and lower markets.

Q. But the cover page of this memorandum indicates it is a memorandum of your firm?

A. That is correct.

Q. A memorandum which you approved and sent out of your firm?

A. That is correct.

Q. As an opinion of the firm?

A. That is right.

Q. And you are responsible for the opinions of your firm, are you?

A. I am. That is correct.

Q. Nevertheless, it is your testimony that you gave no consideration to this paragraph which Mr. Cox read in reaching the opinion you expressed here?

A. No, I didn't say I didn't give it any consideration.

Q. May I be clear. What is your position?

A. I said in my direct testimony, I testified as an underwriter of securities, not as a market analyst, and that my 30 per cent figure was based on what I felt it was necessary for General Motors stock to decline to be able to get up a large group for these secondary offerings.

Now, as a part of all that, it is of interest, of course, to know what the slaughter in values is here, and I have to take that into some consideration, because it is another way of saying the same thing.

[fol. 2580] Q. It is another way of saying the same thing? Will you explain that?

A. Yes. To a certain extent, if you do the arithmetic of saying stock is going down so many points, and then multiply it by the number of shares outstanding, that is doing the same thing another way around.

Q. Well, as an underwriter, do you consider it at all strange that the sale of three billion dollars worth of stock would result in losses of seven to eight billions of dollars?

Mr. Cox: I object to that question because it assumes facts that are not stated in the paragraph, and I think it is, therefore, misleading.

The paragraph is not directed simply to the loss caused by the sale. It is directed to loss of du Pont, tax losses and three or four other things in that question.

By Mr. Reycraft:

Q. I assume you have not only read the paragraph, but you listened to Mr. Cox reading it, and I assume you know what we are talking about. Can you answer my question?

Mr. Cox: Let's have the question read.

The Witness: Will you restate it?

(Question read.)

Mr. Cox: I will ask one question of you, Mr. Reycraft, and then I will subside. Are you deliberately or unintentionally misconstruing the paragraph? Because you are misconstruing it. It doesn't say anthing about an eight billion dollar loss because of the sale.

The Court: The Court stands recessed for ten minutes.

(A recess taken.)

[fol. 2581] The Court: Counsel may proceed.

By Mr. Reycraft:

Q. Mr. Forgan, in forming your opinion with respect to the problems which General Motors might encounter in doing equity financing over the next ten years, did you give consideration to the methods by which General Motors presently develops its capital?

A. Well, General Motors has not done very much financing over a period of a good many years.

Q. Do you know the specific instances in which General Motors has done equity financing over the years?

A. Yes. They had their very large rights offering. When was that—'55, I think.

Q. Yes, sir.

A. And they had a bond issue. Those are the only two that I recall.

Q. Do you know from what source General Motors obtains the capital which it uses in its business at the present time?

A. Well, other than those two pieces of financing, it has been engendered from within the company.

Q. From retained earnings, would that be correct?

A. Retained earnings, yes.

Q. And are you familiar with any other methods which General Motors presently employs to develop capital?

A. No, unless you are referring to their subsidiary, General Motors Acceptance Corporation. Is that what you are referring to?

Q. No, sir, I am not. That is an additional method by which General Motors obtains capital which it uses in the business?

A. It obtains capital for the Acceptance Corporation.

[fol. 2582] Q. And they sell a very large volume?

A. Installment papers, yes.

Q. Are you aware of the fact that General Motors at the present time sells stock on a continuous basis to its employees?

A. Yes, I am, but I did not consider that as a part of financing plans. It is more of a benefit to employees.

Q. Do you know how much money General Motors raises each year for use in the business from this source?

A. No. I have not looked into that.

Q. Do you have any idea of the amount of stock, newly issued stock of General Motors, which is involved in the savings stock plan?

A. No. I know something about the pension plan but I do not know the amount of stock involved in the other plan.

Q. You have not considered then the fact that General Motors sells over one million shares a year of its stock to its employees?

A. Does it? I did not know that. I did not know it was that much.

Q. And you therefore have not considered that in forming your opinion with respect to General Motors' financing problems?

A. No.

Q. Has your opinion with respect to the market consequences of any divestiture in this case been based on the assumption that the marketing would be performed by a series of secondaries?

A. Yes. That seems to me to be the most feasible way of doing it.

Q. And you did not consider the possibility that sales might be made over the exchange or by private placement?

A. Yes, although, as I testified yesterday, in my opinion, to get rid of that amount of stock you would have to go through a series of secondaries which would be the cheapest way to do it.

[fol. 2583] Q. Did you form any opinion with respect to the market impact which might result from the sale of 20 million shares alone over the ten-year period, either on the assumption that the remaining shares were not distributed or that there would be no tax consequence?

A. No, sir, I did not. I took this decree just as it sits and my testimony was based on that.

Q. Did your partner give any consideration to this? I want to be fair to you, Mr. Forgan.

A. I know he did give some consideration to it.

Q. Yes; will you refer to Page 44 of the memorandum. I do not want to mislead you.

A. Yes, I know that.

Q. Will you look at Page 44 first?

A. Yes.

Mr. Cowen: Your Honor, I might say at this point that I have noticed that counsel has been constantly quoting from the report that is not in evidence. Full paragraphs have been read to the witness quoting from this report. It seems to me that in order to explain the quotations more fully and completely that the entire report should be admitted into evidence, and I therefore so move at this time.

Mr. Reycraft: Well, I object, your Honor. The man who prepared the report is not here. This report has been described as a work paper which Mr. Forgan in part agrees with and in part does not agree with, in part relies on and in part doesn't.

Mr. Burnham: He never said he did not agree with it. In fact, he said he agreed with it one hundred per cent.

Mr. Cowen: He said he agreed with it and when you [fol. 2584] quoted from it that he relied on Mr. Fennelly in his report.

Mr. Reycraft: He may also have referred to the manuals and they are not in evidence.

Mr. Cowen: Pardon?

The Court: The Court will take that motion under advisement. I think you should limit your cross examination to those portions of the report that the witness testified to on direct, or otherwise I think we are wasting a lot of time.

Mr. Cowen: The difficulty, your Honor, comes in this way, that the report is a more complete document. Counsel is taking excerpts from the report.

The Court: All right. The Court rules that only those portions of the report should be referred to that was covered by the witness on direct.

Mr. Cowen: He should be cross examined, you mean, your Honor?

The Court: Yes; his cross examination should be limited to his direct testimony and to his direct testimony that referred to those particular portions of the report, but not generally.

Mr. Cowen: Unless counsel wans to put the whole report in evidence. If he does, that is a different picture. Then I think the whole report should go in.

The Court: The Court has ruled.

Mr. Owens: Are you ruling, Mr. Cowen?

Mr. Cowen: I am suggesting to the Court: I am not ruling.

The Court: All right, the Court has ruled. Proceed, please.

[fol. 2585] By Mr. Reycraft:

Q. Well, I understand your answer to be that you personally gave no consideration in forming your opinion to the possibility that the sale of 20 million shares might occur without income tax being due on the shares distributed?

A. My opinion, as I stated yesterday, was based on the decree as it stands, not from some other rewriting of the decree in any way, just as it stands with the full tax implications.

Mr. Reycraft: All right, sir. I have no further questions.

The Court: Any other questions?

Mr. Tierney: No further direct.

The Court: You are excused.

Mr. Tierney: Well, just a moment. Mr. Cox, do you have anything?

Mr. Cox: No.

Mr. Tierney: No further examination.

The Court: You are excused.

(Witness excused.)

Mr. Burnham: Your Honor, General Motors has no further witnesses.

The Court: Has du Pont?

Mr. Cox: May it please the Court, we probably will have another witness but we had assumed that this cross examination would continue longer than it has, so the witness is not now available. I think our documents have all been introduced in evidence.

Mr. Gribbon: I have two.

[fol. 2586] Mr. Cox: Well, we have two documents, Mr. Gribbon might offer.

The Court: Do I understand you have one more witness?

Mr. Cox: We think yes, we will have one more witness.

The Court: So you have nothing further to offer at this time?

Mr. Gribbon: I have two exhibits we could put in at this time, if you wish.

The Court: Very well.

OFFER IN EVIDENCE

Mr. Gribbon: I should like to have identified as du Pont Exhibit 29-A a tabulation entitled, "Deflated Prices and Volume of Trading, RCA Stock, May 1, 1933 through January 2, 1934."

(Thereupon said document was marked Defendant du Pont Exhibit 29-A for identification.)

Mr. Gribbon: This exhibit, your Honor, was asked for at the time of the examination of Mr. Sumner Emerson and is a continuation of one of the exhibits that has been previously received.

The Court: Any objections? It is admitted.

(Said document, so offered and received in evidence was marked Defendant du Pont Exhibit 29-A.)

Mr. Gribbon: I think that is the only one we have at this time.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Reycraft: Your Honor, I have a matter which Mr. Scott and I have discussed. It relates to a subpoena which has been issued to the Wilmington Trust Company, which has been made returnable in Chicago. As a matter of convenience to the company, and I might say also to counsel,

[fol. 2587] we have discussed with counsel for the Wilmington Trust Company this matter and it will be agreeable to all of us to have the subpoena returnable at the U. S. Attorney's office in Wilmington, Delaware, where Mr. Scott and I at the moment both have members of our staff available ready to work on the matter.

We think that by adopting this procedure we will be able to avoid the question of introducing a large number of trust instruments in the record. We are trying to get summaries of the documents which we can put in as a tabulation which will be useful to the Court without introducing a large bulk of trust instruments.

I may say also that there has been entered a stipulation between us with respect to the treatment which will be accorded trust instruments furnished under an earlier subpoena, and it is our wish that the documents furnished under this subpoena be covered by the same stipulation, if your Honor approves.

Mr. Scott: That is entirely agreeable.

Mr. Dallstream: I think all of this gets in the same area of the information which we desired to offer as to the holdings of certain family members and persons who held the office of the director or officer of some of the involved companies. May we have the same understanding, Mr. Reycraft, regarding that information? We have been talking to Mr. Metzger about it all along as to which exhibit it would be offered under, yours or ours.

Mr. Reycraft: The understanding being that the underlying documents are covered by the order, but that any offerings which would be made during the trial, that there would be no protective order and the matter would be taken up with the Court at that time.

[fol. 2588] Mr. Dallstream: But that time is given until we have worked this matter out for the offering of all that information regarding the family holdings?

Mr. Reycraft: Yes. Now, I haven't mentioned the time, your Honor. We expect that this job will be completed in Wilmington on Friday, and I understand that Mr. Scott would have no objection if we started out with our rebuttal on Monday, or started off on Monday by offering that part of our direct case which relates to Christiana and Delaware stock holdings.

Mr. Scott: That is correct, on the assumption, of course, that our case——

Mr. Reycraft: You would be free to reply.

Mr. Scott: Yes, after such time as you have put in your case. Otherwise, we have no objection to this arrangement.

Mr. Dallstream: We may likewise defer until that time.

Mr. Reycraft: Yes, sir.

The Court: The Court has no objection to this agreement.

Mr. Cox: Could I inquire, to get some idea of what our program may be, whether there will be other witnesses? I understand that General Motors——

Mr. Tierney: General Motors is finished.

Mr. Cox: We have a witness. We said, "a witness"; we might have two, but if we have two, we can put one on this afternoon and one on later tomorrow, if we have a second one. So we will, I think, as far as oral testimony is concerned, be finished tomorrow.

Will there be any other testimony, if I may inquire, at this point?

[fol. 2589] Mr. Dallstream: Your Honor, I will be prepared to put my witness on at the resumption of the case after lunch. I was advised by all concerned that this would run into mid-afternoon, so I excused him from being in attendance this morning.

Mr. Cox: There is one matter before we adjourn that I would like to submit to the Court, if I may, which raises a somewhat more general problem; but I would like to suggest to the Court that it seems to me that the time has come in this hearing when the Government should take some final and formal position with respect to the form of judgment that it is asking or going to ask the Court to enter.

The Court will recall that at the very first pretrial conference in this case, the Court directed the parties to file its proposed judgments, and all the parties, including the Government, did; but after the Government filed that final judgment, beginning with its memorandum, which it had filed in September or October of last year, it began to shift and to turn away from its position, so that I at least feel that I am not sure exactly what the Government is now proposing that the Court should do. That

memorandum filed in September contained a number of alternative suggestions. They weren't always consistent, one with the other, and they weren't consistent with the terms of the judgment that the Government had filed in the first instance. Indeed, I got the impression reading that memorandum that the Government was lost in a kind of chaos of options.

Now it seems to me that we really should know, before the evidence closes in this case, what the Government is proposing. I think it would be unfair to the parties and [fol. 2590] unfair to the Court if we, for the first time, were presented with some brand new Government plan, some new proposed judgment in the briefs, where, after the case has been closed and when the parties have no opportunity to really direct their attention to that plan and to present any evidence that the change in the plan seems to require. I therefore earnestly suggest, and I hope that the Government will see its way clear to adopt the suggestion, and that is as soon as possible, and certainly before they conclude their case in rebuttal, and preferably before they start, that they tell us whether they are going to propose a new, and different kind of judgment and if so, what it is, so that everyone will know what it is.

It seems to me hardly fair to the parties and certainly creates difficulties even, I suppose for the Court, to have the matter left in this indefinite state.

Now I would have hesitated perhaps to say this were it not for the fact that during the course of these hearings, Counsel for the Government have suggested from time to time in a very tentative way, it is true, that they were thinking of filing some different proposal or changing their present proposal in some way, and all I am saying now to the Court and Counsel for the Government is if that is so, I think the time has come for them to let us know what it is.

Mr. Tierney: If the Court please, General Motors joins with those statements, and it is really getting late.

Mr. Reycraft: I would like to say, your Honor, that from time to time we have tried to elicit from the witnesses used by all parties useful suggestions which we had hoped would be helpful to the Court. We had, in fact, hoped that many of the witnesses called by the defendants would have been [fol. 2591] asked prior to coming here whether they had

any constructive suggestions to make. Uniformly; it seems to me the witnesses have been limited in the scope of their engagements to arguments relating to the Government's proposal.

We think at this point that the testimony which they have developed has been limited in that regard to the judgment which we filed.

I might say also that any positions we would take with respect to the judgment we have filed, or with respect to any other judgment which has been filed, they would have to be carefully considered, and we would expect to discuss them in our brief, and that indeed is our understanding of the function of the briefs.

I might also add that it is rather an obvious thought that the judgment which we did file was approved by not only the Assistant Attorney General but the Attorney General, and that while I am authorized here to represent the Government, I have no authority to change the decisions they make.

The Court: It is my understanding then that you are standing on the decree that you proposed before this hearing started?

Mr. Reycraft: That is right, sir.

The Court: It is the basis on which you are trying this case?

Mr. Cowen: If they have any alternative suggestions, and they do raise them in the brief, I assume that we will do our best to answer them in our replies which come later, after the Government files them. I think we will just have to leave it that way in view of what Mr. Reycraft has just said.

[fol. 2592] Mr. Cox: I would just like to ask your Honor this question, or perhaps not to ask a question—it is always unwise to ask the Court questions.

But I would like to suggest—I understand Mr. Reycraft's position now to be that he stands on the judgment that was filed. But if the Government should come in on its brief with a brand new proposal sometime, may it please the Court, we may find ourselves in a position where we will have to come into Court and ask for some kind of an opportunity to have a look at that.

The Court: That will depend entirely on the extent or the character of the deviation from the original proposal.

Mr. Cox: I would assume that would be true.

The Court: From what Mr. Reycraft has said, I am assuming that that is the decree, with probably minor changes.

Mr. Reycraft: I have nothing further, your Honor.

The Court: Very well. The Court stands recessed then until two o'clock.

(Whereupon a recess was taken in the trial of the above-captioned cause until two o'clock of the same day, Tuesday, March 31, 1959.)

[fol. 2593] Before Hon. Walter J. LaBuy, Tuesday, March 31, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recess.

Present: Same as before.

The Clerk: Case on trial.

The Court: Proceed, please.

Mr. Gribbon: If your Honor please, a question has arisen with respect to certain documents which the Government proposes to use in evidence.

I wonder if we may take up the matters in Chambers. Would that be convenient?

The Court: Yes, you may.

(Whereupon the Court and Counsel conferred in Chambers, after which the following further proceedings were had in open court:)

The Court: Proceed, please.

Mr. Dallstream: If the Court please, I should like to call Mr. David Skall.

David G. Skall, called as a witness on behalf of Amicus Curiae Dallstream, having been first duly sworn, was examined and testified as follows:

[fol. 2594] Direct Examination.

By Mr. Dallstream:

Q. Will you state your name, please?

A. David G. Skall.

Q. Where do you live, Mr. Skall?

A. Chicago, Illinois.

Q. What is your occupation, Mr. Skall?

A. I am Vice-President of A. G. Becker & Company, Incorporated.

Q. What are your responsibilities and activities at the A. G. Becker & Company, Inc., office?

A. I am a member of the Midwest Stock Exchange. I supervise all of the firm's Exchange activities. Included in that function is the operation of our specialist books and also our trading and arbitrage operations.

Q. Just for the record, Mr. Skall, will you state what degrees, if any, you hold?

A. I hold the degree from the University of Pennsylvania of Bachelor of Science in Economics, and from Western Reserve University, Bachelor of Law.

Q. Would you state in detail what your business experience has been?

A. I started in the securities business in 1929, and became a member of the then Cleveland Stock Exchange. I was a member of that Exchange continuously until 1949, with the exception of a period of Military Service.

In 1949 the Cleveland Stock Exchange, along with others, including the Chicago Stock Exchange, merged to form the Midwest Stock Exchange, and I have been a member of that Exchange ever since.

I joined A. G. Becker in 1949, in order to conduct specialist operations for that firm on the floor of the Midwest Exchange.

Q. For which stocks have you been a specialist on the [fol. 2595] Midwest Stock Exchange?

A. Our firm acts as specialist in a list of over 20 issues. Some of the issues include du Pont, Dow Chemical, Aluminium Limited, Columbia Gas, Chesapeake & Ohio, International Telephone & Telegraph, Ohio Oil, Southern Pacific.

Q. How long have you been specialists for du Pont stock?

A. Since 1949.

Q. Will you please explain to the Court what is the function of a specialist in a particular stock, say, the du Pont stock on the Stock Exchange?

A. In the case of the specialist function, each stock that

is listed on the Exchange is assigned to a specialist for handling.

The specialist, in turn, is responsible for maintaining an orderly market at all times in the issue, for furnishing quotations, and for servicing orders left with him for execution by other brokers.

In the case of du Pont, both on the New York Stock Exchange and the Midwest Stock Exchange, there is only one firm of specialists assigned to service the issue. Consequently, this firm is familiar with all the orders entered for execution during the day and as its function seeks to effect sales in conformity with prices at which the public wishes to buy and sell.

Q. What are your responsibilities with respect to arbitrage transactions?

A. I have been active in the arbitrage market since 1950. Our main activity has been in operations concerning convertible debentures and also convertible preferred issues.

We have been particularly active in convertible debentures of American Telephone & Telegraph, Dow Chemical, Inland Steel, Sinclair Oil, and Standard Oil of Indiana. [fol. 2596] In the preferred issues, we have been active in American Cyanamid, General Telephone and General Dynamics.

These activities are in addition to our normal arbitrage operations between San Francisco, Chicago, and New York.

Q. Would you state what you mean by arbitrage activity in a firm such as A. G. Becker & Company?

A. Well, in the literal definition of the term, arbitrage is a transaction which is entered into when prices are such that an opportunity is created to trade profitably by the purchase of a security in one market and the simultaneous sale of that same security in another market.

The same would apply to convertible securities and the securities into which conversion is permitted.

Q. Without going into too much detail, can you explain what you mean by an arbitrage situation that might exist between two cities?

A. Well, let us say a stock XYZ is quoted at 83½ or ¾ in San Francisco, and I have an opportunity to purchase 100 shares of XYZ on the Midwest at 83⅜.

I will effect the purchase and at the same time immediately sell the same stock in San Francisco at 83½, thus accomplishing a profitable arbitrage transaction.

Q. Does this apply on the international market as well as the local market?

A. It is done constantly internationally, particularly between New York, London, Switzerland, et cetera.

Q. In a broad sense, Mr. Skall, arbitrage covers any transaction in which you buy one security, break it up or change or alter its form, and effect a sale of the substitute security or the component parts after it is broken up?

A. That is correct.

Q. Is it fair to say that that can be carried on profit-
[fol. 2597] ably and satisfactorily only when the securities get into a certain juxtaposition or relationship with each other marketwise?

A. You can only enter into an arbitrage when you have a spread between the basic security and the prices at which the components are selling. In other words, you must buy the basic security for less than you can realize on the components after breaking it up or converting.

Q. When you talk about arbitrage as between securities such as a convertible debenture and the stock into which it is convertible, can you give us an example of that kind of arbitrage, the way it works, other than what you have already said?

A. Well, during the past several years many of our larger corporations have entered into debt financing, using the form of convertible debentures. At the time these issues have been offered to the public, the conversion feature as against the price at which the common stock of that particular corporation is selling is usually between ten to fifteen per cent above the market.

As we have all witnessed in the past several years, we have a rising stock market. During this period the common as well as the convertible debentures have both risen in price. However, the convertible debenture being a fixed income security has not risen as rapidly in proportion as has the equity security of the company.

Gradually, as the market prices have risen, opportunity has been available to purchase the convertible debentures at a price which would permit conversion in the sale of the basic common at a profit.

At this point we have entered into the market, purchased convertible debentures, offered them for conversion, and [fol. 2598] of course, have immediately sold the common equivalent into which conversion is permitted.

Q. Have you read the proposed judgment and report which has been submitted by me in this case, Mr. Skall?

A. Yes, I have read the report and recommendations that you have filed, and also the proposed judgment which is contained in the plan. I have also read your amended judgment as filed with the Internal Revenue Service.

Q. That is in the request for the ruling?

A. Yes, sir.

Q. In particular, are you familiar with the so-called take-down provisions of that proposed judgment?

A. Yes, I am.

Q. Will you state, in general, what you understand those provisions to be, Mr. Skall?

A. Well, in general, under the take-down plan as you have proposed it, stockholders of du Pont will have an opportunity at their election to present an application to the court requesting that they be issued, in place of the du Pont common, a class of security to be known as du Pont special common and their equivalent amount of General Motors, which is represented by each share of du Pont common.

Q. Are you familiar with the fact that the du Pont special common which would be delivered with the General Motors shares would have no interest thereafter in any of the General Motors stock held for take-downs by the other shareholders?

A. Yes, sir.

Q. Do you have an opinion as to whether the du Pont special common which would be issued pursuant to the take-down plan would be a security finding acceptance in the public security market?

A. Well, in my opinion, du Pont——

Q. First, whether you have an opinion?

A. I have such an opinion.

[fol. 2599] Q. And what is that opinion, Mr. Skall?

A. My opinion would be that du Pont special common would not only be an acceptable security in the eyes of the public and the investing fraternity, but also it would un-

doubtedly be in greater demand than would the du Pont common.

Q. What reasons do you have for arriving at that opinion?

A. Well, there are several reasons for my opinion.

In the first place, on the matter of basic analysis, once the Dallstream proposed judgment were entered, analysts preparing brochures and analyses on the du Pont Company as an operating chemical company would, for the first time, have such an opportunity.

Heretofore, all analyses and brochures have had to make reference to the fact of buying a chemical company with a large automotive investment. After this judgment were entered, the chemical company would be analyzed alone and would not have to be so termed as a package deal.

Another very important reason which we have seen in evidence in the action of our securities over the past several years would be the fact that du Pont special would represent an investment solely in the chemical industry. It has been generally recognized that the chemical industry is a growth industry and, as such, a security, such as du Pont, which is considered a leader in that field, would be a highly desirable vehicle.

Here again we have had the opinion expressed by some investors that possibly the automotive industry is no longer a growth industry; therefore, this would afford investors with that thought the opportunity to invest in du Pont solely as a growth chemical situation and not as a chemical company with a large automotive investment.

[fol. 2600] Along the same related lines, in dealing with institutional investors, it has been my experience that they greatly prefer to classify their investment holdings. If du Pont special common and General Motors were desirable for portfolio position, they in turn could buy each security separately and place them in their respective categories in their portfolios.

This again avoids the necessity as exists today of having to purchase du Pont and to isolate part of their investment as an automotive holding rather than a chemical holding.

Lastly, and probably the most important reason that I believe du Pont special would be a very attractive investment, is that even though your plan as proposed were ap-

proved, there still would be a cloud hanging over the holders or purchasers of du Pont common.

As I understand it, this Court reserves the right to maintain jurisdiction over this case and, therefore, at some future time could order divestiture.

It would only seem prudent to an investor, knowing of the tax consequences of a divestiture order at a future date, that this could be avoided by the purchase of du Pont special, and where he would be free and clear of any further tax liabilities.

Q. Will there be a sufficient supply of the special common available within a reasonable time after the adoption of my plan if it were adopted, to take care of the market demand?

A. Yes, I believe this supply can be furnished to the investing public. Upon the adoption of your plan, I am sure that corporate arbitragers would enter the picture and as the public and other investors sought to purchase the special common, they in turn would be purchasers of du [fol. 2601] Pont common, make application to the Court for permission to take down under the plan, and in turn supply du Pont special common as it was desired.

Q. What do you think would be the sources of the common stock of du Pont that would be available for purchase by the arbitragers?

A. Well, the du Pont common stock would be available from the sources that naturally, normally and customarily come into the market for sale. All stockholders are not necessarily sellers, but we have sellers of du Pont, as well as every other stock from time to time.

There is nothing in this proposed judgment which would alter this situation. Over the past ten years we have had a million shares approximately of du Pont traded annually on the New York Stock Exchange. If anything, I would believe that this would be augmented with the approval of the plan as proposed.

So I see no problem on a supply of du Pont common for many years to come.

Q. Mr. Skall, do you think the tax that would be imposed upon the receipt of General Motors shares would deter arbitragers from engaging in these transactions that you have just described?

A. Well, assuming that the Internal Revenue Service issues its ruling as you have requested, then stockholders

would have dividend treatment only after their application for take down had been approved.

In this case the tax would actually not affect the corporate arbitrager. As a matter of fact, due to a peculiarity in the tax law, the corporate arbitrager, after approval of his request for take down had been made and his sale of du Pont special and General Motors had been effected, [fol. 2602] ends up with a slight tax profit; therefore, the tax as it would be imposed on the individual investor is not applicable and arbitrage would be a free and easy matter.

Q. Do you think there are any factors that ought to be taken into consideration that would tend to limit the arbitrage activity that would be available once the plan were adopted?

A. Yes, there is one factor which could be a limiting one, and that is the problem of interest charges on funds which would be invested in du Pont common for a prolonged period of time until the du Pont special common and General Motors was distributed after approval of application for take down.

This could extend on the basis the plan is drafted possibly as long as four and a half months.

Q. Would that factor have to be taken into consideration by the corporate arbitrager in planning when he would buy and the extent and scope of his activities?

A. Yes, it would.

Q. Your conclusion is that if the plan is finally put into effect it could provide for a lesser period, or could be susceptible of operating from a practical standpoint so that the lag between the time of the application and the time it is approved, if it is to be approved, could be shortened; that the operation of the plan would be facilitated?

A. Definitely, sir.

Q. I wish you would explain, Mr. Skall, just how you would operate with respect to the General Motors shares that you would receive upon the take down. What would you do with them?

A. Well, the General Motors shares would be sold at the same time we make purchases of du Pont common.

[fol. 2603] Q. Have you an opinion as to whether these sales would have an effect upon the market price of General Motors stock?

A. Yes, I do.

Q. What is that opinion?

A. I do not believe that the sales by arbitragers of the General Motors shares received under the take-down plan would have any appreciable effect on the market price of General Motors.

Q. Why? What are your reasons?

A. Arbitragers will be selling their General Motors in an orderly fashion. Large amounts will not be coming into the market at any one time. Basically, the arbitrager will gear his bid for du Pont common to the then quoted bids on both General Motors and du Pont special. Therefore, he will be a seller more or less at a fixed price rather than at the market; and if he were forced to sell below, he would end up with a loss on his transaction. Therefore, only filling bids and not selling at the market, you would have a result which would not be one to affect seriously the General Motors market price.

I am aware that over a prolonged period of time a considerable amount of General Motors will come into the market through this manner. However, with the activities of the arbitrager carried on in a normal fashion and not concentrated in any one time, there will not be an over supply of General Motors for sale at any time, which might be sudden or dramatic.

Q. I take it also that the arbitragers are all professional traders who are keenly alive to the market supply and demand features, and the other factors which would have to be taken together to maintain orderly markets.

A. We have to be, or otherwise we would be out of business.

[fol. 2604] Q. Are you familiar with the judgment which has been proposed by the Government in this case?

A. In a general manner, sir.

Q. In your opinion, if the Court should enter that proposed judgment and a large number of stockholders, say the holders of a million shares, should determine to sell their du Pont stock in order to avoid the payment of taxes upon the receipt of General Motors, in your opinion would there be any impact upon the market for the du Pont stock?

A. There would undoubtedly be a severe impact, if we were to have a million shares of du Pont common for sale, in addition to the million shares which I indicated before

are traded annually on the market. We would find that individual buyers would practically be forced out of the market because of the tax consequences of the divestiture, which would come to them in the form of the General Motors stock as ordinary income, if they were to buy their du Pont common. This would leave the buying side of the market almost entirely to corporate investors, who in turn would take advantage of the situation and only enter their buying orders at substantial discounts. As a matter of fact, on the basis of the question as you have stated it, a very artificial market situation would result. On the one hand, we would have an abnormally large number of sellers who would seek to dispose of du Pont common in order to avoid the tax consequences of the receipt of General Motors stock; and, at the same time, we have eliminated from the market almost all individual investors who would seek to avoid the tax consequences of a purchase at this time because of the order of divestiture.

Mr. Dallstream: That completes my direct examination, your Honor.

[fol. 2605] Cross-examination.

By Mr. Cox:

Q. In explaining in your direct examination why you believe there would be a market for the special common stock of the du Pont Company that would be created under Mr. Dallstream's plan, I understood you to refer to the fact that with that stock in existence analysts would then have an opportunity to examine the operations of the du Pont Company on the basis of its chemical business alone. Did I correctly understand your testimony in that respect?

A. Yes, that is correct. They have that opportunity now, because du Pont so reports its earnings on a chemical basis and also on an investment basis of its holding in General Motors.

Q. That is what I wanted to discover, if you were aware of that fact.

A. Yes.

Q. You are aware that the earnings are segregated in the annual report?

A. Very definitely. But in all preparations, analysts still

have to come up with a statement that you are buying into a chemical company with a large automotive holding, which cannot be avoided.

Q. Do you know approximately how many firms or persons there are in the United States who engage in arbitrager activities, or arbitrage activities?

A. I would have no way of knowing. I know it is a considerable number.

Q. Are all of them corporations, or are some of them partnerships?

A. I would say many of them are partnerships.

Q. Assuming the Court should approve Mr. Dallstream's plan, and a partnership, as distinguished from a firm, which was engaged in arbitrage activities, should buy du Pont [fol. 2606] stock and exercise the right to draw down under the plan, do you know what the tax situation of the members of the partnership would be so far as the shares of General Motors which they would receive was concerned?

A. No, I would not be able to give you a specific answer.

Q. Do you know whether that would be taxed to them as income on the basis of the ordinary rate for the individual?

A. No. As a partnership is not taxed, the individual partners are considered as individuals. I would assume that the tax would fall in the same manner.

Q. If not, it would be a different tax situation than the tax that would be imposed on a firm that was organized as a corporation, is that correct?

A. That is correct.

Mr. Cox: I think that is all.

Cross-Examination.

By Mr. Metzger:

Q. Good afternoon, Mr. Skall. My name is Eugene Metzger, for the Government.

You stated in your direct examination, sir, I believe, that du Pont is sold on the Midwest Stock Exchange and that your firm is a specialist for that stock, is that correct?

A. That is correct.

Q. They are not the specialists on the New York Stock Exchange?

A. They are not.

Q. Is du Pont sold on a listed or unlisted basis on the Midwest Exchange?

A. Unlisted.

Q. You spoke in response to questions of Mr. Dallstream regarding the arbitrager buying one piece and selling many other pieces. Ideally, the arbitrager would like to sell exactly what he buys and cut down on overhead. Is that an uncommon situation—to buy a thousand and sell a thou-

[fol. 2607] sand?

A. No, that is common; but that is not necessarily——

Q. You do it either way?

A. You do it either way. Any number of convertible issues are not necessarily in one-hundred share units.

Q. I believe you stated, sir, that under the Dallstream plan there would in balance be a slight tax advantage to the arbitrager. Would you mind explaining to us how you arrive at that conclusion?

A. I would be glad to.

May I have permission to refer to a note on that, your Honor?

The Court: You may.

By the Witness:

A. In the case of a corporate securities dealer, I have had my example prepared on the basis of the assumption that a share of du Pont common is purchased at 200 and that a share of du Pont special is sold at 150, and a share of General Motors at 50. In the first instance, as a corporate receiver of the one share of du Pont, under the take-down plan we would pay a sixteen cent tax, which is calculated as follows: The cost, average cost, to du Pont of its General Motors is $2.09 a share. As a corporate receiver on a dividend tax base, we would pay 7.8 per cent of the value thereof, which is 16 cents.

In the second step, when we dispose of our one share of General Motors, we would establish a profit of $47.91 a share, which would be taxed to us at 52 per cent tax rate, or an amount of $24.91.

In the third step, we would be selling one share of

[fol. 2608] du Pont special; under the tax laws, our cost on the du Pont special would carry forward from our cost on the original share of du Pont or $200 a share, so that a taxable loss of $50 a share would be registered. Therefore, a 52 per cent tax saving would result in a $26 tax credit; so that if you will total the $24.91, plus 16 cents as taxes paid, and credit or rather deduct those from the tax credit of $26, we would end up with a net tax saving of 93 cents per share.

Q. I see. Then this would not apply to an arbitrager alone, but to any institutional buyer, is that correct?

A. Any institutional owner in corporate form could take down du Pont under the plan and have only a 16 cent tax payable until further disposition was made either of the General Motors or of the du Pont special.

Q. That is under either the Government plan or under the other?

A. That is correct.

Q. With the same result. Now turning back, sir, for a moment to your transactions in du Pont stock on the Midwest Stock Exchange, are you yourself familiar with those transactions?

A. Yes, sir.

Q. I wonder if you could tell me, on balance, what is the relationship between individual and institutional buying of du Pont stock, as net purchasing over the past few years?

A. I am sorry. I would have no way of knowing.

Q. You don't know whether there are more or fewer institutional or individual buyers?

A. No, sir, I would have no way of knowing.

Q. Let us assume, sir, that at the present time approximately two-thirds of your net purchases were institutions. Do you have that assumption?

A. Yes.

[fol. 2609] Q. When you spoke before about sale of an additional million shares of du Pont stock under the Government proposal, you stated that this would have a double effect in that the individual buyer would be driven from that market, is that correct?

A. Yes, sir.

Q. So that the sale of a million would have a much more unfortunate effect because a part of the potential buying public for that would have disappeared?

A. Yes, sir.

Q. Now, the remainder of your buying public is the institutional market and the tax-free groups, whatever they may be. Given this assumption we have just made and the fact that a tax advantage would accrue to them on the transaction, would not your thesis that the arbitrager would buy in under the Dallstream equally apply to any institutional buyer under the Government proposal, given a tax advantage on the transaction and given, I think you described it, more advantageous listing of du Pont as a chemical rather than as a monster having two heads?

Mr. Dallstream: Your Honor, I should like to object to that question on the ground that it presupposes the ordinary corporate investor would have the same tax consequences as the security dealer who treats this as ordinary income. The ordinary corporate stockholder who would take down his shares would be relegated to a capital gain or a capital loss on the sale, rather than treating it as ordinary loss or gain income as would a corporate security dealer.

Mr. Metzger: I appreciate the advice, Mr. Dallstream. Let me ask the question if he wishes to change his answer. Do you desire——

[fol. 2610] Mr. Cox: Is there a question on the book? May we have the question read?

Mr. Metzger: No. The witness has testified that the corporate shareholder would have the same treatment. He testified that about ten minutes ago.

Mr. Dallstream: I understood he should have the same treatment on the take down, not on the sale.

Mr. Metzger: That is right.

Mr. Dallstream: And I think your question assumed he would have the same treatment on the sale, which I don't think he said. I merely wanted to straighten that situation out.

Mr. Cox: I am merely trying to find out what the question is. Could we have the question read?

Mr. Metzger: I did not ask the question. Let's see what we can put together from this chaos.

By Mr. Metzger:

Q. Mr. Skall, dealing with the tax problem of the arbitrager, did you inquire into the dividend status of the two

companies? Do you know what the dividend of du Pont is? Do you know what dividend du Pont pays?

A. Yes, sir.

Q. Do you know what dividend General Motors pays?

A. Yes, sir.

Q. Are you familiar with the concept as brought up by Mr. Cox on his cross-examination that du Pont passes through the entire General Motors dividend lacking the dividend tax that they pay?

A. Only in a general way; not specifically.

Q. Now, as a corporation, you state you would pay under the Dallstream plan, 16 cents per share of tax, is that correct?

A. Yes, sir.

[fol. 2611] Q. Would you pay a different tax under the Government plan?

A. I can't answer the question. I am not familiar with it in that I only studied this from an arbitrage standpoint and not from a holder of du Pont, receiving General Motors as a dividend.

Q. You stated you would pay a 7.8 per cent tax on du Pont's basis of $2.09. Let us assume that under the Government plan, the corporate recipient would pay the same tax.

A. Right.

Q. Du Pont is now paying on its General Motors dividend which it passes through to the du Pont stockholders the same 7.8 per cent tax that you are speaking of that the arbitrager would pay.

Given the two pieces of paper, namely, a General Motors share and a du Pont share, the present holder of du Pont would not be receiving his dividend from one source and paying an additional tax on part of the substance. In other words, his chemical income would come to him from du Pont and his motors income would come from General Motors without the interposition of a 7.8 per cent tax per share of General Motors.

Now, with these facts behind us, the institutional investor now would be paying a 16 cent tax on distribution just as the arbitrager pays a 16 cent tax on the receipt under the Dallstream plan.

This institutional investor would be receiving approximately $2.72 per share of du Pont in General Motors divi-

dends at the General Motors current rate less or without the interposition of a 7.8 per cent tax or, roughly, 22 cents additional cash income to him, as opposed to a 16 cent tax.

Given those facts, would not the institutional buyer be inclined to consider du Pont under the Government plan [fol. 2612] a better buy than it is now before the decision as to any plan?

Mr. Cox: May we have the prelude to the question read?

Mr. Metzger: The entire thing?

Mr. Cox: Yes, I got lost. I just want to have it clear.

(Record read.)

Mr. Cox: I object to the question on the ground that no proper foundation has been laid. There is no showing that this witness ever considered or made any examination of the question of the investment attractiveness of du Pont now as opposed to what it would be under the Government plan.

I also object on the further ground that it goes beyond the scope of direct examination.

The Court: If the witness remembers the question?

The Witness: Yes, sir.

The Court: All right. Can you answer it?

By the Witness:

A. I would only have to state an opinion based on the market action of du Pont since this entire trial has begun.

In my opinion, based on the action of other chemical companies, certainly none finer than du Pont, most of the other stocks have risen in the past twelve to eighteen months. Therefore, it would be only logical to conclude that the institutional investor has avoided the purchase of du Pont because of the circumstances that beclouds the issue.

Whether this would change if the issues were once decided would remain to be seen.

[fol. 2613] By Mr. Metzger:

Q. I believe, sir, you testified that A. G. Becker, Incorporated, is a member of the Stock Exchange, and you buy and sell not only as arbitragers but for commerce?

A. Yes, sir.

Q. Given these facts under the Government plan, and the fact that a 22 cent tax saving is made each and every year on a 16 cent one-shot cost, would you advise an institutional client to buy du Pont now, knowing that the Government plan were to be adopted?

A. I don't believe we would advise the purchase of du Pont merely for a tax purpose. We would have to, as a firm, on the basis of analysis, recommend the stock for a long term gain position.

Q. Given the consideration you have just mentioned that you considered du Pont to be one of the finest chemical stocks and your own analysis of the outlook of the chemical industry, let us say that those are satisfactory, would this make a plus or a minus factor in your estimate?

A. It might be of some consequence, but not great.

Mr. Metzger: That is all.

Mr. Dallstream: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Gribbon: The du Pont Company recalls Dr. Benjamin Tepping.

Benjamin Tepping, a witness recalled on behalf of the defendant, E. I. du Pont de Nemours & Company, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: You have been previously sworn?

The Witness: Yes, I have.

[fol. 2614] Mr. Reycraft: May I ask for what purpose Dr. Tepping is being recalled, Mr. Gribbon?

Mr. Gribbon: For two purposes, one to testify with respect to an exhibit which I will have marked here promptly, and the other for such cross examination as you care to make on the basis of the work papers that you have been examining the last two weeks.

Mr. Reycraft: Do you have a copy of the exhibit you are going to produce?

Mr. Gribbon: Yes, sir.

Mr. Reycraft: May I have it?

Mr. Gribbon: You received it this morning.

Mr. Gribbon: I ask first that there be marked for identification as Defendant DP 58, a tabulation entitled, "Estimated additional income taxes that would be payable by individual beneficial owners of du Pont common stock on the assumption that all of the General Motors stock owned by du Pont (63 million shares) is distributed to the du Pont stockholders in a single distribution period."

(Thereupon said document was marked Defendant du Pont Exhibit 58 for identification.)

Direct examination.—Resumed)

By Mr. Gribbon:

Q. Doctor Tepping, do you have a copy of Exhibit, du Pont Number 58?

A. Yes, I do.

Q. Will you hold it there. Was that exhibit prepared under your supervision and direction?

A. Yes, it was.

Q. Do you vouch for its accuracy?

A. Yes, sir.

Q. Will you explain the dollar figure of additional income that was used in making the calculations set forth [fol. 2615] in this exhibit?

A. We were instructed to perform a computation of the same sort that were included in previous exhibits but on a different assumption with respect to the amount of income that an owner of du Pont stock would receive. These assumptions are shown in the footnote of this exhibit, namely, that the market value of General Motors is $45 per share and that 61.34 per cent of the distribution is taxable as ordinary income.

The figure——

Q. Where did you obtain that figure of 61.34 per cent?

A. I was given this figure by counsel.

Q. And did you make the necessary mathematical calculations to work out the amount of additional income that each du Pont shareholder would receive?

A. Yes, I did.

Q. And on the assumption you have stated, what was that amount?

A. That is $38.02 per share of du Pont stock.

Q. Now, looking at the figures in the first two columns, "Total: Number of Owners and Number of du Pont Shares Owned," are those the same figures that appear in the same place in du Pont Exhibit 25?

A. Yes, they are.

Q. And were they prepared in the same way?

A. They are the same figures. They were merely copied from that.

Q. Now, the next two columns headed, "Total," will you tell us what those figures represent?

A. Those figures represent my estimates of the tax and the effective tax rates for all individuals, for individuals not beneficiaries of trusts, for individuals who are beneficiaries of trusts, in each case classified by the number of shares owned and computed on the same basis as the corresponding figures in earlier exhibits for other assumed methods of distribution and prices of General Motors stock.

Q. And the first two figures across the page, the one [fol. 2616] under, "Tax Rate," does that represent the effective tax rate at which——

A. 61.4 per cent represents our estimate of the effective tax rate on the assumptions stated.

Q. The total tax——

A. The total tax is estimated to be $588,044,000.

Q. Now, that would be payable all in one year under the assumptions you have made here, is that correct?

A. That is correct.

Q. Now, those two columns that you have just been describing represent the totals of the figures arrived at in the next four columns, do they not?

A. Correct.

Q. Looking at the column headed, "Represented by Responses in Survey," were those calculations made in the same manner as you have testified to with respect to du Pont Exhibit 17?

A. Yes, they were.

Q. And looking at the figures in the last two columns, headed, "Represented by Non-Responses in Survey," would you tell us the manner in which those figures were calculated?

A. Those figures were calculated by observing in the previous imputation that I had made for non-respondents

the ratio of the tax computed for non-respondents to the tax estimated for respondents in each of the several classes shown in the left-hand column of this table.

These ratios are computed for each of the four market prices assumed in our earlier computations. I find that these ratios are very closely the same, out to the fourth decimal place.

I therefore used the same ratio to obtain the figures for the non-response representation of tax.

Q. You referred to your previous imputation; is that [fol. 2617] represented by the figures set forth in du Pont Exhibit 22?

A. May I see it?

Q. Yes.

A. Yes, it is.

Mr. Gribbon: I offer du Pont Exhibit 58 in evidence.

Mr. Reycraft: No objection.

Do you have any objection, Mr. Andrews?

The Court: Is there any objection?

Mr. Andrews: We would only object and have the same objection we did to the prior exhibits, that they are based on hearsay evidence. The same objection we had.

The Court: Overruled. It is admitted.

(Said document, so offered and received in evidence, was marked Defendant du Pont Exhibit 58.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Gribbon: May I have just one minute, your Honor?

The Court: Very well.

Mr. Gribbon: Your Honor, we have no further questions of Dr. Tepping.

I assume it would be appropriate for the Government to conclude their cross-examination of Dr. Tepping. You will recall he was excused subject to recall in the event upon examination of his work papers it was necessary to examine him.

The Court: You may cross-examine.

Mr. Reycraft: We have no cross-examination, your Honor.

The Court: You are excused.

Mr. Gribbon: Your Honor, may I just bring up one point while Dr. Tepping is here?

We have been served with a batch of documents. It was [fol. 2618] sitting on my desk here. They came from Dr. Tepping's work papers. It is our understanding the Government intends to introduce them in evidence at some time.

Now, it would seem to me that this is the appropriate time for them to be introduced in evidence, because, otherwise, we will simply have to call Dr. Tepping a third time to come and explain them, because they are his work papers and they are completely unintelligible without some explanation of their significance to his survey.

Mr. Andrews: Your Honor, the only reservation we have to introducing them at this time is that they are just not ready to be introduced, because we turned them over to Mr. Gribbon because he wanted to blank out some names and I have not received them back again.

It is not just in order to be properly introduced.

The Court: Would you be ready tomorrow morning?

Mr. Gribbon: There they are with all the names now. (Indicating.)

The Court: Well, will Dr. Tepping remain over until tomorrow morning?

Mr. Gribbon: He can, if you so direct, your Honor.

The Court: All right, tomorrow morning.

Mr. Andrews: We will be ready tomorrow morning, your Honor.

The Court: You are excused.

(Witness excused.)

The Court: Are there any further witnesses to be heard? [fol. 2619] Mr. Cox: I think, if it please the Court, that we have no further documentary proof and no further witnesses. I thought before lunch that we might have another witness, but it now appears we will not be able to produce that witness this week.

Mr. Tierney: If the Court please, I wonder if it is possible for the Government to finish rebuttal by the end of this week?

Mr. Tierney: All right, I will cancel my reservation.

Mr. Dallstream: If the Court please, I wish to make a statement before the Court and for the record in this case on behalf of Mr. Cowen and myself as amici who have served in this cause.

In preparing for the trial of this case with respect to the remedy to be approved by the Court and made a part of its judgment, Mr. Cowen and I have conceived it to be our duty to see that this record contained all information which would be required to enable the Court to exercise and form an independent judgment in selecting the most appropriate remedy, but that we should refrain from partisanship insofar as the circumstances permitted us to do so, and at the same time discharge our duties to the stockholders of the respective companies whose interests we were appointed to protect.

As I held meetings with institutional stockholders and substantial individual stockholders over the country more than a year ago, I started arranging for various witnesses who would be available to cover various points of the case which I felt should be covered, and I am sure that Mr. [fol. 2620] Cowen did the same thing in the conferences which he held over the country.

As further visits were had because it became apparent to us, as it perhaps has to all the counsel in this case, that the attorneys representing the various interests, including even the Government, have covered many of the same trails in preparing for witnesses who would testify at these hearings.

Mr. Cowen and I had expected to offer a substantial number of witnesses. As the case progressed, the same type of witnesses have been presented by other parties. Day after day we have checked off as presented factual matters which we felt should be presented and have every few days determined that another witness we had expected to call might be excused, because the subject matter had been covered by other witnesses.

We conceive that no good purpose can be served by testimony which is largely cumulative and, therefore, we now conclude that we have fully discharged our obligations to the Court with respect to the offering of testimony, and we do not desire to offer any further witnesses.

Mr. Cowen: We think, your Honor, that this is particularly applicable in this case where the trial of the case has already lasted and extended over a period of more than

six weeks. So with your Honor's permission we will not offer any testimony.

Mr. Bushby: If the Court please, I want the record to be clear that along with the Government, Christiana and Delaware will have some evidence beginning next week regarding stock holdings in the companies.

Mr. Reycraft: Your Honor, we discussed this this morn-
[fol. 2621] ing and I understood that your Honor approved the suggestion.

The Court: Yes. I have no objection.

Mr. Dallstream: Your Honor, I have one question I would like to ask counsel in the case. We have conceived it might be proper at some time in this case to be an issue as to whether or not the special common stock which would be issued under a take-down plan could be lawfully issued under the laws of Delaware.

We have briefed that case pretty thoroughly in the past, as well as consulted with Delaware counsel. I have conceived it to be proper to file a brief in that regard and establish for the benefit of the Court the legality of the issue of that special stock if it becomes important in the Court's opinion by brief rather than putting a Delaware counsel on the stand and interrogating him about it.

If there is any diversity of opinion amongst counsel in that regard, I should like to have the case remain open until the time of rebuttal for the purpose of bringing such a witness.

Mr. Reycraft: Pardon me. I did not hear your last sentence.

Mr. Dallstream: I say, if you have an objection to it being handled by brief—I think the Court is perfectly able to determine the law after he receives the Delaware statute and citations in the Delaware cases, but if there is any feeling on the part of counsel then it should be proved by Delaware counsel.

Mr. Reycraft: I have no reason to think we would disagree with you.

[fols. 2622-2623] The Court: It being a matter of law, I think that that is the proper way to present it, by brief.

Mr. Dallstream: If you feel differently about it, why we can bring it up later.

Mr. Reycraft: I have no reason to think it would not be proper by brief.

The Court: Well, is there anything further this afternoon, gentlemen?

Now, as I understand, you want until—well, now, of course, Doctor Tepping will be back tomorrow morning.

Mr. Gribbon: Tomorrow morning.

The Court: Do I understand there will be no more evidence offered after that?

Mr. Reycraft: Until Monday, then, your Honor.

The Court: You are asking adjournment until Monday?

Mr. Reycraft: Yes.

The Court: How long do you anticipate you will take?

Mr. Reycraft: About two or three days, your Honor.

Mr. Cox: I hope at some point we can have a list of witnesses, Mr. Reycraft.

Mr. Reycraft: Yes. I wanted to wait until you closed your case. I will try to give you some indication as soon as possible.

The Court: Then we will adjourn until tomorrow morning.

(Whereupon an adjournment was taken in the trial of the above-entitled cause until Wednesday, April 1, 1959, at 10:00 o'clock, a.m.)

[fol. 2624]

Transcript of Proceedings of April 1, 1959

COLLOQUY BETWEEN COURT AND COUNSEL

The Clerk: Case on trial.

The Court: Counsel may proceed.

Mr. Gribbon: Your Honor, if I may, I should like to clarify three matters dealing with these work papers of Dr. Tepping. In the first place, I would like to have the assurance of the Government that they have returned to us all of the copies they made of the six work papers which were ruled upon yesterday afternoon in Chambers, and which the Court directed should be returned to us this morning.

Now, you have given us some of the copies. I would just like your assurance that we have them all.

Mr. Reycraft: Your honor, am I to understand that you have ruled on this question and we are directed to return these papers?

The Court: That is correct.

Mr. Reycraft: I have a set with me right here, which I will return to Mr. Gribbon in accordance with your Honor's direction. I would like to have your Honor's permission to file a memorandum on one of these papers which I do not think is work product, and which I would like to have an opportunity to be heard on.

The Court: Why not single it out and let me look at it and I will give you a ruling on it?

Mr. Reycraft: Yes, sir. I might say initially, your Honor, the draft brief memorandum I have no question about as being work product. Of course, it is an attorney's work product. There is a memorandum which was written in the office of National Analysts, dated October 1, 1958. I see no evidence that this particular memorandum is work product. [fol. 2625] There is further a draft of a letter from Mr. Greenewalt which has his typed signature which I also see no evidence that it is a work product. It is a draft of his letter.

There is a memorandum, a summary of a conference held in the office of National Analysts, dated May 19, 1958, by National Analysts. I see no evidence that that is work product.

Then there is——

The Court: Well, Mr. Reycraft, isn't the issue here whether or not it is one of Dr. Tepping's work papers? As I understood, the Court directed that the defendants should produce his work papers.

Mr. Reycraft: Yes, sir, and they were produced.

The Court: The question is, are these his work papers? If they aren't, they should be returned. In other words, Mr. Greenewalt's letter, or whatever it is, that is not one of Dr. Tepping's work papers, is it?

Mr. Reycraft: That is right. I think that is correct. I think it is not one of his work papers, but it is a letter by Mr. Greenewalt which may have some separate evidentiary value.

Mr. Gribbon: Your Honor—excuse me, I did not mean to interrupt you, but it is in fact an earlier draft of a letter. The letter was ultimately sent. They do have a copy of that letter and presumably will introduce it in evidence. This is simply an early draft which was never sent. It was prepared by the Legal Department and by counsel.

Mr. Reycraft: Well, may we have these documents marked, your Honor, if there could be a ruling on it?

The Court: You may.

[fol. 2626] OFFERS IN EVIDENCE

Mr. Reycraft: Mr. Reporter, will you mark for identification as Government's Exhibit Number 544 a memorandum dated May 19, 1958 by National Analysts.

(Thereupon said document was marked Government Exhibit 544 for identification.)

Mr. Reycraft: It is a memorandum entitled, "Memorandum for File, National Analysts, Stockholder Survey" dated May 19, 1958.

A memorandum headed; "National Analysts, Inc., Inter-Office Memorandum to Doctor Kilpatrick, Doctor Tepping, Mr. Parseghian and Mr. King" dated October 1, 1958 as Government's Exhibit 545.

(Thereupon said document was marked Government Exhibit 545 for identification.)

Mr. Reycraft: A draft of a letter dated May, 1958 to stockholders of E. I. du Pont de Nemours & Company, nine pages, bearing the typed signature of Crawford H. Greenewalt, President, as Government's Exhibit 546.

(Thereupon said document was marked Government Exhibit 546 for identification.)

Mr. Reycraft: A letter dated October 14, 1958 from C. H. Dan, Research Director of National Analysts to Mr. Daniel Gribbon as 547.

(Thereupon said document was marked Government Exhibit 547 for identification.)

Mr. Gribbon: Your Honor, I would like to have counsel for the Government state the evidentiary significance of these papers he has marked as Government's 544, and Government's 546. Government's 546 is this earlier draft of a letter prepared by lawyers, which was never sent.

[fol. 2627] Mr. Reycraft: Yes. Your Honor will recall yesterday Mr. Cox asked the Government to state whether

there was any change in the Government's position with respect to divestiture. This letter indicates that the du Pont Company itself was seriously contemplating recommending divestiture in accordance with the terms set forth in this letter.

Mr. Gribbon: In that event it is clearly irrelevant and incompetent and has no significance here.

Mr. Cox: The letter does not say that anyway.

Mr. Reycraft: The letter speaks for itself.

Mr. Gribbon: How about 544?

Mr. Reycraft: Number 544 is a memorandum discussing the methods used by National Analysts in preparing this survey. I think it properly is a work paper of National Analysts.

The Court: Is that one of the papers that Dr. Tepping prepared?

Mr. Reycraft: It bears the initials "E.L.G.". I don't know who "E.L.G." is.

The Court: Are you objecting to that one, too?

Mr. Gribbon: We object to the use of that as a work paper of Dr. Tepping because it is not such a work paper. It is a memorandum of a conference that was held in our office between lawyers and National Analysts.

Mr. Reycraft: Is "E.L.G." Mr. Gilpin?

Mr. Gribbon: Yes, it is.

Mr. Reycraft: Mr. Gilpin apparently is the author of this memorandum. He is not a lawyer, your Honor. He [fol. 2628] is in court. I think this memorandum is not a work product, as I understand the term.

Mr. Cox: I think we are overlooking something here, if I may intervene. We had what we regarded—and I think it is with justification—an understanding, Mr. Reycraft, that no correspondence between Covington & Burling and National Analysts, nothing reflecting on those communications would be taken or used by the Government.

This is the first time in my 20 years of professional experience—and I have tried cases of all kind—when counsel has treated an obligation of this kind in the spirit of a pawnbroker.

Mr. Reycraft: Well, I deny that, Mr. Cox, Mr. Gribbon and his associates went over these documents and took out what they considered to be privileged.

Mr. Cox: On the question of privilege, you understood this was a mistake; and you understood and agreed that this kind of thing was not to be used.

Mr. Reycraft: I had no such agreement. The agreement was——

The Court: Well, all right, gentlemen.

Mr. Tierney: If the Court please, aside from this privilege, I have not had the opportunity to look at this, but I cannot see where it has any relevancy or materiality to this hearing.

The Court: Well, the objection is sustained.

Proceed, please.

Mr. Gribbon: Two other matters involving these documents: Your Honor will recall that when the Government [fol. 2629] was first permitted to examine these work papers, the question was raised as to whether that might not delve into the confidential nature of the inquiries that had been made to the various stockholders.

It was agreed at that time that means would be taken to prevent disclosure of the names of the respondents. Accordingly, we have worked out with the Government a procedure which will obliterate the names of the people to whom letters were sent and from whom inquiries were made and some of the documents that will be marked for identification and perhaps received in evidence will accordingly be incomplete in that respect.

It is my understanding that the Government sees no relevance to the disclosure of the names and is agreeable to this procedure. I merely wanted that stated for the record.

Mr. Reycraft: We have that agreement, your Honor, and that is the only agreement we have.

Mr. Gribbon: Now, in addition, your Honor, I would like to have an assurance on the record from the Government that all of the National Analysts' work papers, all of the papers that were examined, have been returned to the National Analysts.

These papers were returned in such shape that it was impossible to make an examination to find out whether everything was there. There appear to be some missing, but if the Government will state on the record that they have returned everything to their knowledge, we will accept that assurance.

Mr. Reycraft: We believe we have returned everything, your Honor. We have some copies here on the table. Those your Honor has ordered us to turn over and we will do so. [fol. 2630] I might say with reference to Mr. Gribbon's remarks as to the shape the papers were returned in, we were asked to get the papers ready so a man could take the five o'clock train, and we gave them to him more rapidly than we would have otherwise. If they are not in the shape that you would have preferred, that is the reason.

Mr. Gribbon: We do have your assurance that all the originals have been returned?

Mr. Reycraft: You do.

Mr. Andrews: Your Honor, I had the reporter mark a number of form letters and other related material as Government Exhibit 548 through Government Exhibit 561.

Now this is part of a folder that was prepared by National Analysts. The first part of this folder was introduced during Dr. Tepping's testimony, and I would like to introduce the remainder.

The Court: Any objection?

Mr. Gribbon: No objection.

The Court: It is received.

(Said documents, so offered and received in evidence, were marked Government Exhibits Nos. 548 to 561, both inclusive.)

Mr. Andrews: Your Honor, regarding the fact that the other parties have not received copies of these exhibits, perhaps Mr. Gribbon would care to say a word about that.

Would you, Mr. Gribbon?

Mr. Gribbon: No, I don't care to say anything about that.

Mr. Andrews: The reason is, I think Mr. Gribbon preferred that we did not hand these documents out to the [fol. 2631] other parties; and pursuant to that agreement, we did not do so.

Is that correct, Mr. Gribbon?

Mr. Gribbon: The fact is, Mr. Andrews, the other parties have received copies of these papers. They were served on the other parties and received some eight days before Dr. Tepping took the stand.

Mr. Andrews: Well, as to the remainder of the exhibits, however, we do have that agreement—that we would not serve copies on the parties.

Mr. Gribbon: I did ask that you not serve on the other parties documents which contained the names of respondents, so that those wouldn't be floating around. I don't know that any of the other parties have raised any objection to that.

Mr. Andrews: Will the reporter please mark this document as Government Exhibit 562?

(Thereupon said document was marked Government Exhibit 562, for identification.)

Mr. Andrews: Your Honor, I have had the reporter mark this exhibit as Government Exhibit 562.

This exhibit consists of a number of letters which were either sent to or received by National Analysts in connection with the survey.

To aid the other parties to identify the letters I am referring to, I will read off the numbers and the letters that are in this document.

The number that is in the lower right-hand corner.

[fol. 2632] Beginning with 199, 200, 201, 202, 203, 204, 206, 207, 208, 211, 212, 213, 214, 215, 216, 217, 218, 220, 226, 227, 228, 229, 230, 232, 294, 296, 297 and 298.

I offer those into evidence.

Mr. Gribbon: Your Honor, I object to the admission in evidence of these documents unless some foundation is laid. I think it should be established that they were used by Dr. Tepping and what significance they did have in the preparation of his report. These documents have no independent significance.

The Court: Yes, I think that should be established.

Mr. Gribbon: I think Dr. Tepping is here, and he can be called to lay whatever foundation is necessary.

Mr. Andrews: I will call Dr. Tepping, then, your Honor.

BENJAMIN J. TEPPING, a witness called as a witness by the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Andrews:

Dr. Tepping, I would like you to take a few moments and look over the exhibit that you have before you.

A. Do you want me to look at the entire thing?
Q. Yes.

The Court: There are a great many pages here. Why not suggest to him the pages that you are offering?

Mr. Andrews: I am offering all of them.
The Court: The whole thing?
Mr. Andrews: Yes, I am.
The Court: All right.
[fol. 2633] Mr. Gribbon: I might say that Dr. Tepping has had an opportunity to examine these papers; they are not being put to him at the last minute, so I think if counsel would proceed with his questions, we probably could go ahead.

By Mr. Andrews:

Q. Dr. Tepping, do you recognize those pages before you?
A. Yes. Those that I have seen, I recognize.
Q. Would you tell us what they are?
A. These are copies of various letters, apparently to and from National Analysts; the other party in each case being a respondent in the survey.

The Court: Those are stockholders?
The Witness: Not in all cases. In some cases these are banks and brokers who are fiduciaries for owners of stock.
The Court: Fiduciaries and stockholders?
The Witness: That is right.
Mr. Andrews: I might say, your Honor, in that connection that where we have blocked out the names or where they have been cut out, where it was a bank or some fiduciary, it is typed on there, too.

By Mr. Andrews:

Q. Were these among your work papers, Dr. Tepping, that you turned over?
A. Yes, these were among the 39 boxes that you examined.

Mr. Andrews: I offer this exhibit into evidence, your Honor.
Mr. Gribbon: May I ask a few questions on this, your Honor?

[fol. 2634] The Court: Yes.

Cross-examination.

By Mr. Gribbon:

Q. You have had an opportunity to examine these papers, which have been marked as Government Exhibit 562, have you, Doctor Tepping?

A. Yes.

Q. You note that a number of them refer to the question of trusts?

A. Yes.

Q. The type of trust that is involved, and how a report shall be made with respect to trusts?

A. Yes.

Q. Would you tell us how you set out to handle the problem of trusts in the conduct of your survey; what your initial, briefly what your initial decision was as to how trusts should be reported, and how the tax should be computed?

Mr. Andrews: Wasn't this covered on his direct examination, your Honor? I think it was on the cross also—if I understand your question.

Mr. Gribbon: These papers, your Honor, as always happens when a bunch of papers are shoveled in, raise questions that were not completely covered on the direct and cross examinations, because we didn't think it important.

The Court: Are you objecting to these questions?

Mr. Andrews: No, your Honor. However, your Honor, we are not shoveling in papers here. I would like to point out that we selected these from some thirty-six boxes, so I hardly think it could be termed as "shoveling in."

The Court: Proceed.

[fol. 2635] By the Witness:

A. We recognized from the first that there were certain complexities in dealing with the problem of estimating a tax that would be payable by trusts and by beneficiaries of trusts.

Our initial instructions from our client were to estimate the tax that would be paid on the basis of two different as-

sumptions. These two are two of the three which I mentioned in direct testimony.

In the course of further discussions, it was deemed useful to estimate it also on the basis of the third assumption that I mentioned.

By Mr. Gribbon:

Q. What are those three assumptions? What are the first two?

A. The first assumption is that income received by a trust, additional income resulting from General Motors shares, would be distributed in precisely the same proportions as income of the trust was distributed in the year 1957.

Q. What was the second assumption?

A. The second assumption was that all such income would be distributed.

Q. To the income beneficiaries?

A. To the income beneficiaries, and then retained for the corpus of the trust.

Q. And what was the third assumption?

A. The third assumption was all of such income would be retained by the corpus of the trust.

Q. Did you proceed to make computations on that basis?

A. We did; and in January we submitted a report to our client, incorporating tables showing the tax on the basis of each of these three assumptions.

In that report also I stated that, in my opinion, the [fol. 2636] information, the data tabulated on the basis of the assumptions that all of the income would be retained by the corpus of the trust, were not useful. This arose from the fact that having made these tabulations, we saw that only a small proportion of the trusts paid any tax in 1957.

Q. How did that factor affect your computations?

A. If a trust paid no tax in 1957, it was not possible for us to compute what tax would be paid in the event of an additional income. That is to say, if a trust paid no tax in 1957, it might have been that they sustained a loss and that any additional income or at least part of the additional income might merely reduce the amount of that loss.

We could not assume, it seemed to me, that additional income would be taxable. Some part of it might be covered

by the loss. So that we were not able to compute any tax for additional income in the case of a trust which paid no tax in 1957.

Now, we found that a large proportion of the trusts paid no tax in 1957. We were, therefore, for those not able to compute a tax, and therefore the basis of computation which assumed that all such income would be retained by the trust could be based only upon a very small proportion of the trusts which might pay a tax on such income.

We therefore recommended to our client that these particular data were not really worth looking at. They were not to be regarded as reliable.

Q. Now what assumptions with respect to the distribution of trust income did you make in your final computations?

A. The final computations were based on the single assumption that the distribution of trust income was precisely [fol. 2637] the same as in 1957 as among trust beneficiaries and the corpus of the trust.

Q. Were there any limitations on that? Were there any situations where you did not make that assumption specifically?

A. Yes. In such cases as the trust officer informed us that the income distributed to beneficiaries in 1957 was a fixed amount rather than determined as a percentage of the total income of the trust, we assumed no additional income to that beneficiary in the case of additional income to the trust.

To say it in other words, if the beneficiary was entitled to a fixed annuity, for example, we assumed that he would obtain no additional income from the sale or distribution of General Motors stock, and that all of such would go to the corpus of the trust.

Q. Now, finally, was the decision to compute the additional income to trust beneficiaries on the assumption that additional income would be distributed on the same basis as income had been distributed in 1957, was that decision influenced in any way by instructions you received from your client?

A. No, quite the contrary. I think our client was anxious to have the data on all three bases, and it was our recommendation that certainly one of them was not very reliable.

Q. May I ask you to direct your attention to a document that bears the number 206 at the bottom, and which is in-

cluded among the papers in Government Exhibit 562. I will not mention any names, and I would ask that you not mention them either.

The third paragraph of this letter, which presumably is from a stockholder, says: "I might also add, if it will be of further assistance to you in your analysis that the ordinary income of this trust for 1957 was absorbed by a very sub-
[fol. 2638] stantial ordinary loss from an oil venture in which this trust is a participant, so that the income tax paid by the trust for that year was applicable solely to capital gains realized within that year."

Now, Doctor Tepping, did this additional information which the stockholder volunteered assist you in any way in your survey?

A. Not at all. This is an example of the sort of thing I mentioned a few moments ago, that we could not compute a tax in such an instance.

Q. Did you in any way take into account extraneous remarks that were made by stockholders as to the reason why their income was higher or lower in 1957?

A. No.

Q. You relied entirely upon the form as they filled it out in your questionnaires?

A. Well, there were instances in which correspondence indicated information that was not properly stated in the form. For example, a respondent might have left a question blank.

We then wrote to him and asked him what information should have been entered in those, and to this extent we took information from letters. But this information in this particular letter would not have entered into our calculations in any way.

Q. But if the stockholder volunteered his income was unusually low in a particular year, did that enter into your calculations in any way?

A. No, sir.

Mr. Gribbon: I have no further questions, your Honor.

Direct Examination:—(continued)

By Mr. Andrews:

Q. I have a question, your Honor. Dr. Tepping, as I understand your testimony now, you did actually compute

[fol. 2639] what this additional tax would be on the three assumptions that you made? You did actually compute it; however, you discarded two, is that correct?

A. Yes. I might say that we computed it for those shares that were represented by respondents.

Q. Dr. Tepping, I hand you the transcript which contains your direct testimony, and refer you to Page 2,386 at the bottom of the page. Would you read your answer in that regard?

A. "We were unable to make the two additional computations. This is a result of the fact that such a large proportion of the trusts paid no income tax in 1957, having no residual income upon which to pay a tax. If an entity had paid a tax in 1957, it was possible for us to compute the tax that would become payable upon an increase in that income, but if an entity had paid no tax in 1957, it wasn't possible for us to determine how much tax they would pay if they did have income, because, in fact, they may, for example, have operated at a loss in 1957."

Q. Now, referring to the first part of your answer when you said you were unable to compute, are you modifying that now to the extent that you did actually make those computations but discarded them?

A. We were unable to make this computation, you see, for such a trust.

Q. You never even made the computations at all?

A. I think there is a misunderstanding. I am not saying anything different than I have already said here. This was a result of the fact that such a large proportion of the trusts paid no income in 1957. For such a trust, we could make no computation of the tax on additional income in 1957.

Mr. Andrews: I see.

Will you mark this Government Exhibit No. 563 for identification, please?

(Thereupon said document was marked Government Exhibit 563 for identification.)

[fol. 2640] By Mr. Andrews:

Q. Dr. Tepping, I hand you an exhibit marked Government Exhibit 563 for purposes of identification.

Is that the study that you referred to, I think, in your testimony with Mr. Gribbon that you submitted to counsel in January?

A. This is a copy of our report to our client.

Q. In that exhibit that you have there, does it contain these tables you refer to in which you actually computed the tax for the trusts on these three assumptions?

A. Yes, it does.

Q. Does it also contain some additional tables other than that?

A. Yes.

Mr. Andrews: Your Honor, I move Government Exhibit No. 563 be received in evidence.

Cross-examination:—(continued)

By Mr. Gribbon:

Q. Dr. Tepping, is Government Exhibit 563 confined to the statistical estimate that you made with respect to those stockholders represented in the survey?

A. Yes, it is. It represents or refers only to those shares which are represented by respondents in the survey.

Q. And Government Exhibit 563 is your initial report to your client, is that correct?

A. That is correct.

Q. Was there any significant variation in the substance of the result as finally testified to in this case, as compared with the results of your survey as set forth in Government Exhibit 563?

A. No significant difference.

Q. There were changes in the form of presentation, were there not?

A. Yes.

[fol. 2641] Q. And some tables were eliminated?

A. Right.

Q. But the substance remained the same?

A. Quite right.

Direct Examination—(Continued)

By Mr. Andrews:

Q. Doctor Tepping, I did note one difference between the study you have there and the tables in evidence. I think

there you broke down the tax that would be paid according to, I think, four different income groups, is that correct?

A. Yes. Of course, that is right, but this is not a difference.

Q. I understand that.

A. It is an additional table.

Q. But you have it broken down that way?

A. Yes. These are additional tables.

Q. Could you tell me why that was changed? Why did you decide not to do it by four different income groups?

A. I think it is a little misleading to say it was changed.

Q. Well, I don't want to misstate what you did. State it in your own terms.

Mr. Gribbon: I can tell you why. We decided not to put that in evidence because we considered, on examination, that it wasn't particularly relevant. Doctor Tepping did not make the decision.

Mr. Andrews: Thank you. That is all I wanted to know. I offer Government Exhibit Number 563.

The Court: Any objection?

Mr. Gribbon: No objection.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government Exhibit 563.)

Mr. Andrews: I will ask that this be marked Government Exhibit No. 564 for identification.

[fol. 2642] (Thereupon said document was marked Government Exhibit 564 for identification.)

By Mr. Andrews:

Q. I hand you Government Exhibit marked 564 for identification. Were those papers among your work papers?

A. I believe so.

Q. That breaks down stockholders, I think, in subgroups in the 100 group from 1 to 10, 10 to 25?

A. Yes.

Mr. Andrews: I offer Government Exhibit 564 into evidence.

Mr. Gribbon: Will you identify it for us, please?

Mr. Andrews: I am sorry. This is a classification of

stockholders by size of holdings, class of stockholders, and has the number 33.

The Witness: I might point out that I did not prepare that.

Mr. Andrews: I understand that. I think that was given to you by the du Pont Company, is that correct?

The Witness: Yes. I think that is a product of someone in the du Pont Company.

Mr. Gribbon: Is this a four-page document?

Mr. Andrews: Yes.

Mr. Gribbon: No objection.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Government Exhibit 564.)

Mr. Andrews: I will ask that these be marked Government Exhibits 565 and 566 respectively for identification.

(Thereupon said documents were marked Government Exhibits 565 and 566 for identification.)

[fol. 2643] By Mr. Andrews:

Q. Doctor Tepping, I hand you Government Exhibit marked 565 for identification. Was that paper among your work papers that you submitted to us?

A. Yes.

Q. Would you describe the exhibit, just what it is?

A. These are four sheets containing essentially the same information.

This shows the number of inquiries made at the first stage of the sample to stockholders of record. It shows it by type of stockholder and by number of shares held according to the du Pont record.

The sheets are marked off so as to distinguish the various classes of stockholders to whom the various sampling rates were to be applied. The first of these shows the contributions from two parts of the sample.

I think that describes it.

Q. Now, these figures that you have, like in the 1 to 10 group, I think you have, for instance, 40 there.

Does that represent the number of questionnaires that were sent out on your final sample? Is that the total number sent out initially?

A. The total number sent out is the sum of the two numbers that you find in that cell, 40 plus 26. It is a total number of——

Q. What is the 26?

A. You will recall that we made a pilot study in the summer. This pilot study was designed to answer certain questions about the format of the questionnaires we used and various other technical aspects of the survey.

We then went ahead with the main sample, and it was economical to discard as little as possible of the information that we had obtained in the pilot study. We therefore [fol. 2644] made an appropriate selection on the basis of the same mathematical principles that I have discussed in order to incorporate to the extent possible the questionnaires which we received in the pilot study.

The handwritten numbers in the cells is the contribution from that pilot study. The typed number is the contribution from what I have called the main sample.

Q. Doctor Tepping, did you compute what the tax rate would be for these various sub-groups, 1 to 10, 11 to 25, 26 to 50? I am aware that it is not in your final exhibit.

A. No, I did not.

Q. I was wondering if you did compute it.

A. No. The small groups were combined into the class 1 to 100 in all of the tabulations that we made.

Q. I hand you Government Exhibit No. 566 for identification. Do you recognize that exhibit?

A. Yes, I do.

Q. Would you describe the exhibit please?

A. This is an administrative report form which served as a basis for our keeping track of how the survey responses were coming so that we would be able to know at what points in time further spurs to the respondents need be applied.

These figures are probably not quite accurate since it was not for that purpose necessary to make them accurate. To that extent they may differ from an exhibit which has been offered in evidence showing the numbers.

Q. Which exhibit is that, the previous Exhibit No. 565 that you are referring to?

A. No, an exhibit which was offered in evidence during my direct testimony, showing the number of first-stage inquiries mailed out to stockholders of record.

[fol. 2645] Mr. Andrews: I offer Government Exhibits 565 and 566.

Mr. Gribbon: So the record will be clear, I believe the exhibit to which you have referred is du Pont Exhibit DP 7, which shows the total mailing of 10,576 compared to the figure here of 10,402. That is the small discrepancy to which you referred.

The Witness: Yes.

Mr. Gribbon: I have no objection.

The Court: It is received.

(Said documents, so offered and received in evidence, were marked Government Exhibits 565 and 566.)

Mr. Andrews: I will ask the reporter to mark this document as Government Exhibit 567, for identification.

(Whereupon said document was marked Government Exhibit 567, for identification.)

By Mr. Andrews:

Q. I hand you an exhibit marked Government Exhibit 567, for purposes of identification. Do you recognize that exhibit?

A. Yes.

Q. Was that among your work papers?

A. It may have been. I suppose it was.

Q. Would you describe the nature of the exhibit, Doctor Tepping?

A. This is apparently a printed letter addressed to stockholders of E. I. du Pont de Nemours and Company, dated May 14, 1958, with the printed signature "Crawford H. Greenewalt, President."

Mr. Andrews: I offer Government Exhibit 567.

[fol. 2646] Cross-examination:—(continued)

By Mr. Gribbon:

Q. Did you have any part in preparing this letter, Doctor Tepping?

A. None.

Q. Did it enter into your survey in any way?

A. No.

Q. Do you recall any discussion that might have involved this letter at all?

A. There was at one time some discussion of whether this letter should be mailed to the stockholders selected for our sample along with the questionnaires.

Q. What conclusion was arrived at as a result of that discussion?

A. That this not be done.

Q. And it was not mailed?

A. It was not mailed.

Q. Was another letter from President Greenewalt to the shareholders mailed along with your survey questionnaire?

A. Yes, it was. It has been introduced.

Q. And that is du Pont Exhibit 8, is it not?

A. Yes.

Mr. Gribbon: Your Honor, I object to the admission of this. It has no relevance to the inquiry, and has no additional relevance as near as I can make out. It played no part in the survey as conducted.

Mr. Andrews: Could I put a few questions to the witness, your Honor.

The Court: Yes.

Direct Examination:—(continued)

By Mr. Andrews:

Q. Doctor Tepping, in conducting your surveys, sample surveys as you have done, is it of any importance to con- [fol. 2647] sider whether the respondents would have any bias or interest in the ultimate outcome of the survey?

A. Yes, it is.

Q. It is an important factor?

A. Yes.

Q. Doctor Tepping, when you mailed out the various questionnaires to respondents or the stockholders who were selected for your sample, at that time did you also—in fact, I think you just testified that you did include letters from Mr. King, who is President of your company, and letters from the President of du Pont to the effect that these results that you obtained will be used in this litigation?

A. Yes.

Q. Could you tell me when those letters were mailed out? I suppose part of them were in June, was it, as part of your study?

A. Yes.

Q. And the remainder were in September, is that correct?

A. September, and the following weeks.

Mr. Andrews: Your Honor, I do think that this particular letter here does have relevance to this survey, and should be considered along with the other material.

According to Doctor Tepping's testimony, the fact that the respondents may have biases or interests is of importance, and it is a fact that they considered in making this survey.

This letter was from the President of du Pont to all stockholders of du Pont, and I presume they received it, and I would just like to read one paragraph of this letter just to indicate that a bias or interest on the part of the stockholders could have resulted as a result of this letter, and furthermore——

The Court: Pardon me. Is this a communication that was not sent?

[fol. 2648] Mr. Andrews: No, this is one that was sent, your Honor. This was actually sent to all stockholders.

The Court: I didn't understand that there was an objection to one that was sent.

Mr. Gribbon: I object to it as not being any part of Doctor Tepping's work papers. This was not sent out by National Analysts. Another one was sent, and that is in evidence.

The Court: By National Analysts?

Mr. Gribbon: This was not sent by them. This is a letter that President Greenewalt sent on May 14, 1958, to the stockholders, advising them of the pendency of this litigation and of the developments to date.

Mr. Andrews: However, your Honor, I think Doctor Tepping testified that whether stockholders are biased or interested in the ultimate result of the survey is of importance.

He also testified that they sent letters to the stockholders at the time they sent the questionnaires, telling them the result of the survey would be used in this litigation.

Now, I would just like to read one paragraph of this letter to your Honor, which will illustrate that bias could have been introduced, and therefore I think it should be considered along with all the other materials used in the survey to weigh the results.

The Court: May I see the letter? Hand it to the Clerk.

Mr. Andrews: I refer particularly to Paragraph 4 on the first page.

[fol. 2649] Mr. Gribbon: Your Honor, I will withdraw the objection providing Counsel wants to read the whole letter. I think it is very helpful.

The Court: If the objection is withdrawn, then it is received in its entirety.

Mr. Andrews: Do you wish me to read that, read the letter?

The Court: No. That will be my homework for the next couple of months.

(Said document, so offered and received in evidence, was marked Government Exhibit 567.)

Mr. Andrews: Will you mark this as Government's Exhibit 568?

(Thereupon said document was marked Government Exhibit 568, for identification.)

Mr. Andrews: For Counsel's benefit, I will read the letters that are included in this exhibit marked for identification Government's Exhibit 568.

In the lower right-hand corner the numbers are as follows:

210, 219, 231, 233, 234, 237, 238, 282, 285, 293 and 295.

By Mr. Andrews:

Q. Doctor Tepping, I hand you Government's Exhibit marked 568 for purposes of identification. Do you recognize those papers as coming from the work papers turned over to the Government?

A. Yes.

Q. Will you identify what these papers are?

A. They appear to be copies of correspondence between National Analysts and various respondents.

Mr. Andrews: I see. I offer Government's Exhibit 568.

[fol. 2650] Mr. Gribbon: May I have just a minute to examine these, your Honor?

The Court: Very well.

Mr. Andrews: Mark this as Government's Exhibit 569.

(Thereupon said document was marked Government Exhibit 569, for identification.)

Cross-examination—(Continued):

By Mr. Gribbon:

Q. Doctor Tepping, would you refer to the document which carries the number 237 in the lower right-hand corner?

A. I have it.

Q. That is a letter in which a stockholder states his reasons for refusing to co-operate in the survey, is that correct?

A. Yes.

Q. I refer you to the last paragraph, to the statement:

"We are one family united and among other investments this fund owns 2,000 shares of du Pont."

What course of action did you take with respect to that particular stockholder?

A. This was filed with other non-respondents and entered into the tabulations in no way.

Q. Will you look at Exhibit 238? Does that appear to be a response to that letter? Would you read——

A. Yes.

Q. Read that little paragraph, will you, please?

A. Yes I beg your pardon?

Q. Read the middle paragraph in the letter 238.

A. The one that begins "We require"?

Q. Yes.

A. (Reading) "We require different information from different people depending on the manner in which any [fol. 2651] particular block of stock is held. In order that this block of stock may be included in the final report in this study, we are now sending you the material needed

under the circumstances described above. Would you please fill in the enclosed questionnaires and return them to National Analysts, Incorporated?"

Q. So you made another effort to secure the co-operation of that stockholder?

A. Yes. I believe, though, that the letter from which I just read was answered by the first letter referred to.

Q. Yes; so that ultimately this ended up in the non-respondent group?

A. Correct.

Q. And you were unable to make any calculation on a statistical basis with respect to that 2,024 shares?

A. That is right.

Q. Will you refer, please, to the exhibit that bears the number 293, dated October 23, 1958?

A. Yes.

Q. What is the substance of that communication from a stockholder?

Mr. Andrews: Your Honor, I believe these letters speak for themselves. I do not think you have to take time to go through them. They are straightforward.

Mr. Gribbon: Well, if you want to leave everything out, that is fine with me. You are the one who brings this evidence here.

By Mr. Gribbon:

Q. Will you explain the substance of that communication?

The Court: Just generally.

[fol. 2652] By the Witness:

A. It seems to me that this respondent is telling us that the sample we selected consists of a couple of minor children, and this could not be of very great interest to us, and suggests to us that we change our sample and take certain other accounts on the original list that he sent us in place of those that we had selected.

Q. And did you take such action on the basis of this stockholder's recommendation?

A. Of course not.

Q. What action did you take with respect to this letter?

A. We wrote another letter, which I think is attached, or at least I have seen a copy of another letter that we wrote to this company explaining that—no, I am sorry. I retract that.

We have a note on this letter which explains what action was taken.

Q. What was that?

A. One of our staff called by telephone this company to explain that this sample was selected on a statistical basis and that no substitutions could be made, and the trust officer promised to get the information that we required.

Mr. Gribbon: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit No. 568.)

Mr. Andrews: Would the reporter mark this Government Exhibit 569, for identification?

(Thereupon said document was marked Government Exhibit No. 569, for identification.)

[fol. 2653] Direct Examination:—(continued)

By Mr. Andrews:

Q. Dr. Tepping, I hand you an exhibit marked Government's Exhibit 569 for purposes of identification. Do you recognize that exhibit?

A. Yes.

Q. Was this among the work papers that were turned over to us?

A. Yes.

Q. Would you describe the nature of the exhibit?

A. These letters are——

Q. If I might help you, I think——

A. This is a set involving correspondence between a certain respondent, a certain owner selected for our sample, between him, the du Pont Company and us.

Q. Did he appear to be somewhat confused as to what you wanted by your questionnaire?

A. Yes.

Mr. Andrews: I offer Government's Exhibit No. 569 into evidence, your Honor.

By Mr. Gribbon:

Q. Dr. Tepping, is it unusual in conducting a survey to find some respondents who are confused by a questionnaire?

A. Not at all.

Q. Have you ever conducted a survey where you didn't find a certain number of respondents who were confused by the questionnaire?

A. Never.

Mr. Gribbon: That is all.

Mr. Andrews: I have just one question here.

Direct examination:—(continued)

By Mr. Andrews:

Q. Dr. Tepping, how did this survey compare as to its [fol. 2654] complexities and problems as to other surveys that you have conducted? Were there any innovations?

A. Yes, there were. There we e some notable innovations, which I referred to before.

This is the first time, to my knowledge, that a survey of beneficial owners of stock has been made, as contrasted with a survey of stockholders of record.

Q. I believe you testified that this did create a number of problems?

A. Yes, it did, which I think were successfully solved.

Mr. Andrews: Will the reporter please mark this document as Government's Exhibit 570 for identification?

(Thereupon said document was marked Government's Exhibit 570 for identification.)

By Mr. Andrews:

Q. Dr. Tepping, I hand you Government's Exhibit 570 for purposes of identification. Do you recognize that exhibit?

A. Yes.

Q. Was that among your work papers?

A. Yes.

Q. Would you describe the exhibit?

A. Well, these are two questionnaires upon which the sample stockholder has made some notes; a letter from National Analysts to a prospective respondent; and a copy of a form letter from Arnold J. King to a respondent, on which that respondent has written a note.

Q. And it would denote that the respondent has written to what effect?

A. (Reading):

"I have 42 shares of du Pont Company, but I do not know how to fill out this form."

"Signed Mrs. Blank."

[fol. 2655] Mr. Andrews: I offer Government's Exhibit 570, your Honor.

The Court: Any objection?

Mr. Gribbon: Your Honor, I am not quite sure on this, as yet.

Is this your Exhibit 570?

Mr. Andrews: Yes.

Cross-examination.

By Mr. Gribbon:

Q. Dr. Tepping, upon receipt of the communication from the shareholder which you have just read, explaining difficulty in filling out this form, did this exhibit indicate what action was taken by the National Analysts?

A. May I see the exhibit again?

(Exhibit handed to the witness.)

A. Yes, there is a notation in the margin which says "Write," which indicates to me that we wrote again to this respondent to urge her to fill out the form.

Q. Would you look at the paper marked "300" at the bottom? Would that be a letter that you wrote to this respondent?

A. Yes, it is.

Q. What was the substance of the National Analysts reply to this respondent who seemed unable to fill out the form?

A. We explained to her that the respondents were selected by proved statistical sampling methods; that once

selected, we can't replace by another; and that since the results are to be used as court evidence, we would like to have as many responses as possible, and that no one but this respondent can supply the information that we require.

"We are therefore sending you another questionnaire. [fol. 2656] All that we want is information from your income tax return for 1957."

We suggested that the respondent forward it to the individual or organization that prepares her tax return, "together with your instructions that the questionnaire be completed on your behalf and returned promptly to National Analysts."

Mr. Gribbon: That is all.

Mr. Andrews: Doctor Tepping, is that a form letter that you just read?

The Witness: No, it is not a form letter.

Mr. Gribbon: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 570.)

Direct Examination—(Continued)

Mr. Andrews: Will the reporter please mark this document as Government's Exhibit 571 for identification?

(Thereupon said document was marked Government Exhibit 571 for identification.)

By Mr. Andrews:

Q. Doctor Tepping, I hand you Government's Exhibit 571 for purposes of identification. Do you recognize that exhibit?

A. Yes.

Q. Was that exhibit among your work papers that you turned over to us?

A. Yes.

Q. Would you describe the exhibit?

A. It consists of two letters from stockholders.

[fol. 2657] Mr. Andrews: I offer Government's Exhibit 571 into evidence, your Honor.

The Court: Any objection?

Cross-Examination.

By Mr. Gribbon:

Q. I note, Doctor Tepping, that the respondent on 286-A suggests that she cannot help you and she thinks it would be more logical to choose men for the sample who are more conversant in such matters.

Did you adopt that suggestion?

A. No.

Mr. Gribbon: I have no objection.

The Court: It is admitted.

(Said document so offered and received in evidence was marked Government Exhibit 571)

Direct Examination—(Continued)

Mr. Andrews: Will the reporter please mark this as Government's Exhibit 572 for identification purposes?

(Thereupon said document was marked Government Exhibit 572 for identification.)

By Mr. Andrews:

Q. Doctor Tepping, I hand you Government's Exhibit 572 for purposes of identification. Do you recognize that exhibit?

A. Yes.

Q. Was that among your work papers?

A. Yes.

Q. Would you describe the exhibit?

Mr. Tierney: Excuse me, but are all of these exhibits going to be handled in this way? Do we have to sit here all morning while you read them one at a time?

[fol. 2658] The Court: Are there many more?

Mr. Andrews: Not too many. I do have them in groups, and I think I have three or four more groups, besides individual work papers.

However, I would be glad to have them marked and put them in without a witness.

Mr. Tierney: I am sorry. I withdraw my objection.

The Court: Proceed.

By Mr. Andrews:

Q. I believe I asked you to describe the exhibit? Did you?

A. Yes. This is a letter from a trust officer to National Analysts; another letter to one of our staff from someone, apparently a bank. The third one is a handwritten note by a member of our staff, describing a telephone conversation with a bank; and the fourth is a memorandum from me to a member of our staff, describing another telephone conversation.

Mr. Andrews: I offer Government's Exhibit 572, your Honor.

Mr. Gribbon: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 572.)

Mr. Andrews: Will the reporter please mark this document as Government's Exhibit 573 for identification?

(Thereupon said document was marked Government Exhibit 573 for identification.)

By Mr. Andrews:

Q. Doctor Tepping, I hand you Government's Exhibit 573 for identification. Was that among your work papers?

A. Yes.

[fol. 2659] Q. Is that a similar exhibit as the last one you described?

A. In general, yes.

Mr. Andrews: I offer Government's Exhibit 573, your Honor.

Mr. Gribbon: May I have a few moments to examine this, your honor?

The Witness: These seem to be of a slightly different character than the others. These seem to refer to the fact that we reimbursed the fiduciaries for their expenses in preparing the data that we required.

By Mr. Andrews:

Q. Did you do this to a large extent, if they went to any

expense in filling out the questionnaires? Did you reimburse them?

A. Our original letter, which is already in evidence, informed the fiduciaries that we stood ready to reimburse them for extraordinary clerical expenses in collecting the data from their records that we required.

Q. Did the form letter to the fiduciaries only have this phrase, or was it also to individual stockholders of record?

A. Only fiduciaries.

Q. Did very many of them take advantage of your offer?

A. 38.

Cross-examination.

By Mr. Gribbon:

Q. We might as well complete that, Doctor Tepping. You, at my request, did look into the matter of how many fiduciaries asked reimbursement for their services, is that correct?

A. Yes.

Q. I think you mentioned in your original form letter, which has been marked du Pont Exhibit 10-A, and also the [fol. 2660] one that has been marked Exhibit 11-A—you held out to the fiduciaries that if they did go to the trouble and expense in preparing this for you, you would reimburse them?

A. That is right.

Q. I think you said you received requests from 38 fiduciaries for reimbursement?

A. Yes.

Q. Do you know what the range of the figures was for reimbursement?

A. I have listed them for you.

Q. You have prepared that list, have you not?

A. Yes, I did.

Q. Would you just tell us the range?

A. It ranged $2.00 in one case to $1525 in another.

Q. And there were 38 different fiduciaries?

A. Yes.

Q. What was the total amount that was spent in reimbursing fiduciaries for their assistance?

A. About $5400.

Mr. Gribbon: I have no objection.

Mr. Andrews: Your Honor, could we have that paper marked?

The Court: Certainly.

Mr. Andrews: Do you have any objection to that?

Mr. Gribbon: Certainly not.

Mr. Andrews: Will the reporter please mark this as Government's Exhibit 575 for identification?

(Thereupon said document was marked Government Exhibit 575 for identification.)

Mr. Andrews: I offer it at this time.

The Court: It is admitted.

(Said documents so offered and received in evidence were marked Government Exhibits 573 and 575.)

Mr. Gribbon: I wonder, your Honor, if the Government [fol. 2661] is suggesting the fact that some of these fiduciaries were paid somehow undermines the validity or the accuracy of the results here?

Is that your contention?

Mr. Andrews: No, I am not suggesting anything.

Mr. Gribbon: I don't quite see the relevancy of it. If that was the suggestion, I think we ought to have it out. Obviously, these banks aren't going through a great deal of work and not get paid for it.

The Court: It went in without objection, so it is received.

Mr. Andrews: Will the reporter please mark this as Government's Exhibit 574 for identification?

(Thereupon said document was marked Government Exhibit 574 for identification.)

Direct Examination:—(continued)

By Mr. Andrews:

Q. Doctor Tepping, I think you have Government's Exhibit 574 before you for identification. Are those also letters that came from the work papers turned over to us?

A. Yes.

Mr. Andrews: I offer Government's Exhibit 574, your Honor.

Mr. Gribbon: I haven't seen what is in it, yet.

No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence was marked Government Exhibit 574.)

Mr. Andrews: Will the reporter please mark this document as Government's Exhibit 576 for identification?

[fol. 2662] (Said document was thereupon marked Government Exhibit 576 for identification.)

By Mr. Andrews:

Q. Doctor Tepping, I hand you an Exhibit marked Government's Exhibit 576 for identification. Was that also among your work papers?

A. Yes.

Q. Would you describe the exhibit?

A. This is apparently a copy of a letter sent by a fiduciary to one of its accounts, urging them to cooperate in the survey which National Analysts is conducting.

Q. Do you know whether many such letters were sent by fiduciaries along with the questionnaires that you had sent to them?

A. I don't know how many, but I know that in some instances such letters were prepared by the fiduciary and the material transmitted to the sample account included such encouragement by the fiduciary to cooperate in the survey.

Mr. Andrews: I offer Government's Exhibit 576, your Honor.

Cross-examination.

By Mr. Gribbon:

Q. Doctor Tepping, was Government's Exhibit 576 prepared by National Analysts?

A. No, it was not.

Q. Did you ask this fiduciary or any other fiduciary to prepare a letter such as this?

A. I believe that there is language in our form letter to fiduciaries which asks their cooperation in urging their sample accounts to cooperate in the survey.

Q. The manner of their cooperation is entirely up to the individual fiduciary?

A. That is correct.

Q. And do you know how this came to be in your work papers?

A. I would suppose that it happened to be enclosed in [fol. 2663] a form, in a completed form, which the respondent returned to us. It would ordinarily—well, obviously, it is addressed to an individual of some kind, incidentally in Costa Rica, so that it would not have entered into your tabulations.

Costa Rica is foreign, isn't it?

Mr. Gribbon: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 576.)

Direct Examination:—(continued)

Mr. Andrews: Will the reporter please mark this as Government's Exhibit 577 for identification?

(Thereupon said document was marked Government Exhibit 577 for identification.)

By Mr. Andrews:

Q. Doctor Tepping, I hand you Government's Exhibit marked 577 for identification. Would you describe the exhibit?

A. Some of these appear to be letters and notes from owners selected for the sample, refusing to fill out the information required by us; and one instance of a letter from a bank, in which, incidentally, the name was not obliterated.

Cross-examination:—(continued)

By Mr. Gribbon:

Q. I believe you stated, Doctor Tepping, that this exhibit

appears to represent a number of refusals by stockholders to give you the requested information?

A. Yes.

Q. Without reference to any single one of these cases, [fol. 2664] when you did receive such a refusal from a stockholder, what further part in your survey did that stockholder play?

A. If we were convinced that it really was a refusal and we could not get the information from that holder, this was simply filed as a non-response.

Q. And that non-response would go along with others to make up the two-thirds of the total in the scope of the survey for which you did not make a statistical estimate—or the one-third of the total in the scope of the survey for which you did not make a statistical estimate?

A. Correct.

Q. You did not attempt to compute the tax yourself for any of these people that refused to cooperate?

A. No.

Mr. Gribbon: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government Exhibit 577.)

Mr. Andrews: Your Honor, I wonder if it would expedite matters if we could adjourn for ten minutes and have Mr. Gribbon look over what I am offering?

The Court: Yes, maybe we could expedite it.

Mr. Andrews: First, I shall ask that these documents be marked Government's Exhibits 578, 579, 580, 581, 582 and 583 for identification.

(Thereupon said documents were marked Government Exhibits 578, 579, 580, 581, 582 and 583, for identification.)

The Court: The Court stands adjourned for ten minutes.

(A short recess was taken.)

The Court: Proceed, please.

[fol. 2665] By Mr. Andrews:

Q. Dr. Tepping, I hand you Government Exhibits marked 578 through 583, for purposes of identification.

Will you look those over carefully and see if you recognize those as coming from your work papers?

A. Yes.

Mr. Andrews: I offer these exhibits into evidence, your Honor.

Cross-examination.

By Mr. Gribbon:

Q. The document that has been identified as Government Exhibit 579, do you have that before you?

A. Yes.

Q. Have you read that paper?

A. Yes.

Q. Will you tell us what the stockholder's complaint is here and how you were able to resolve it?

A. He complains that we have asked him to submit the information several times. In fact, he calls this triplication.

Apparently what happened was that he submitted an income tax return to the Internal Revenue Service. He counts this as one.

Apparently both he and his wife were owners of du Pont stock, and both fell into the sample. He regarded our inquiry of his wife as the second inquiry, and our inquiry of him as the third.

We handled this as we would any other. His wife's response, apparently, was returned first from the information in this letter. We have a notation that it is in.

If that response indicated that the tax return was a joint return, the information, of course, would be the same for both spouses, and we would have then written to him to tell him we needed no further information, because we could transcribe the information that he had already submitted, and properly weigh it in our calculations.

[fol. 2666] Q. Were the same shares, in fact, included in the survey more than once?

A. No, they were not.

Q. Would you examine Government exhibit marked for identification as 582? This letter from a fiduciary reports that 25 per cent of the income was reported for 20 beneficiaries.

It states that each beneficiary received only an extremely small percentage of total income, and we therefore did not send the beneficiary questionnaires.

Q. How did the 25 per cent of the income that was distributed to these 20 beneficiaries enter in your survey?

A. The note of one of the members of our staff on this letter characterizes this as a refusal for the last 25 per cent of income. This meant that that income did not enter into our calculations of tax at all.

Q. That portion of the trust income went into the non-response group?

A. Correct.

Q. And the portion that was included in the response group was simply the 75 per cent on which you did have an adequate return?

A. Yes, sir.

Mr. Gribbon: I have no objection to these exhibits.

The Court: They are admitted.

(Said documents, so offered and received in evidence, were marked Government Exhibits Nos. 578 through 583.)

Direct Examination—(continued)

Mr. Andrews: Your Honor, I do not have these marked by the reporter. We can have them marked at a later time.

[fol. 2667] By Mr. Andrews:

Q. Dr. Tepping, I hand you some exhibits which will be marked Government Exhibits 584 through 588 for purposes of identification.

Do you recognize those exhibits as coming from your work papers?

A. Yes.

Q. Will you describe the exhibits?

A. There is a memorandum from a law firm that National Analysts engaged as tax consultants at the beginning of this study; a memorandum prepared by me on March 19, 1958, proposing or giving a first proposal, I should say, for a sample design for such survey; a sheet of paper in my handwriting entitled, "Number of non-respondents 10/22/58"; a sheet in my handwriting and labeled "Non-

responses presumed individuals"; a scatter diagram untitled——

Q. Do you recognize the scatter diagram?

A. Yes, I do.

Q. Will you tell us what that is?

A. This is a scatter diagram showing the relationship between the effective tax rate and the number of shares held by certain owners who reported in our pilot study in the summer of 1958.

Q. What does the diagram show as to this relationship?

A. It shows that there is a very large variability in the tax rate paid by a respondent even though you restrict yourself to a given number of shares held. So that, for example, for owners of 100 to 200 shares, the tax rate for these few individuals that were examined in the pilot study, the tax rate ranged from about 22 per cent to 87 per cent.

Mr. Andrews: I have no further questions, your Honor. I offer those in evidence.

Mr. Gribbon: He hasn't finished.

[fol. 2668] The Witness: I hadn't completed describing them.

By the Witness:

A. (Continuing) This is another draft which is purely mathematical in the sense that it is based on information gathered from the survey.

Another draft which graphically displays the relationship between the tax in dollars and the market price of General Motors stock as computed from some tabulated data, but I can't remember whether this was the final data.

There was, you may recall, a preliminary tabulation that was made in November and this may have been based on data from that preliminary tabulation.

There are, then, two sheets entitled Cumulative Per Cent Received, which graphically displays for my use during the course of the survey for administration of various procedures the proportion of the initial questionnaires mailed out that were received by certain date.

I should add that this does not mean that everything so received was eligible for tabulation. That is, as soon as we received a response from the sample stockholder, this was entered for this purpose.

The review of that material to see whether it was sufficiently complete at that point to enter into the calculations was made later, so that this does not reflect that.

Q. I think the second graph you referred to, you said, was nothing but a mathematical representation and had nothing to do with the survey, is that correct?

A. It had nothing to do with the survey.

Mr. Andrews: If there is any objection to that, your Honor, I will withdraw it.

[fol. 2669] Mr. Gribbon: I think it might as well be withdrawn because it has nothing to do with the survey.

The Court: Is there any objection to its being withdrawn?

Mr. Tierney: No objection.

Mr. Gribbon: I have some questions on some of the exhibits.

Cross-examination.

By Mr. Gribbon:

Q. Will you refer, please, to Exhibit 584, which I believe you identified as a memorandum to National Analysts from Pepper, Bodine, Frick, Scheetz & Hamilton?

A. Correct.

Q. They are a law firm in Philadelphia?

A. Yes.

Q. Did they advise with you in the preparation of the questionnaires?

A. Yes, they did.

Q. Did you consult with them from time to time as to the adequacy of the information you were collecting?

A. From the point of view of the proper way in which to compute the taxes and in which taxes are related to distributions of trusts, that kind of question.

Q. Would you refer to Government Exhibit 585, memorandum dated March 19, 1958, and headed, "du Pont Sample Design?"

This, as I understand it, was a tentative or a preliminary design that you prepared?

A. Yes.

Q. Is this the design that was actually followed in the conduct of the survey?

A. No.

Q. In what significant respects does it differ from the [fol. 2670] design that was actually followed in the survey?

A. In the first place, the sample sizes were changed considerably.

Q. Upward or downward?

A. Upward.

Q. You increased the sample size?

A. Correct.

Q. What other changes? I refer you specifically to page 3.

A. Yes. One other major change was that the original proposal that I have made included provision to get a sub-sample of individual stockholders to whom we would not send the questionnaire but would send an interviewer instead, and to include in the survey also a personal interview sample of owners who did not respond.

Q. Now, both of those proposals were dropped in your final survey? You did not conduct personal interviews of respondents and you did not conduct any survey of non-respondents?

A. Correct.

Q. Now, would you tell us why those two features of the original plan were dropped?

A. There were two or three important reasons for dropping them. In the first place, further consideration of the problem showed that there would be many respondents whom we could not reach in a personal interview. We could at most reach only those respondents who were stockholders of record.

This at once minimizes the usefulness of a personal interview approach. Then a second important reason is one on which I have expressed an opinion before, namely, that in a survey designed to get information of the type involved here, I believe that better information can be obtained if the respondent has a form which he can at leisure fill out by referring to his own records.

I believe those are the most important reasons. In addition, a personal interview is a fairly expensive kind of an [fol. 2671] operation, so that even if the other two reasons had not been present, I suppose we would have con-

sidered very seriously whether it was worthwhile to conduct any personal interviews.

Q. Was the decision to change the sample design and procedure in the respects you have mentioned a technical decision or was it influenced by your client?

A. It was completely a technical decision and I think I personally was the one who had most to do with it.

Mr. Gribbon: I have no objection.

The Court: They are admitted into evidence.

(Said document, so offered and received in evidence, were marked Government Exhibits Nos. 584, 585, 586, 587 and 588.)

Direct Examination:—(continued)

By Mr. Andrews:

Q. Dr. Tepping, I hand you Government Exhibit 589 for the purposes of identification. Do you recognize that exhibit?

A. Yes.

Q. Referring to the second—well, would you first describe that exhibit?

A. This consists of two sheets of which the first is labeled, "Government's Proposed Final Judgment-Impact of Federal Taxes (figures based on 12/31/57 stockholder data.)"

This is a sheet that was prepared by someone in the du Pont Company and given to a member of our staff very early in our negotiations as general background.

The second sheet had the same purpose, and is entitled, "Factual data regarding du Pont common stock registered in the name of certain banks and their nominees," and [fol. 2672] refers to three specific banks and shows how many shares of du Pont common stock were registered in their nominees, how many accounts, and what proportion of them are for the account of tax-exempt institutions.

Q. Dr. Tepping, referring to the second sheet that you were just reading from, would you care to tell us the names of those banks, or would that come within the confidentiality of this?

A. These are not names which I obtained. This was material that was prepared by the du Pont Company.

Q. The du Pont Company submitted this to you?

A. Yes.

Q. Could you read the names of the banks into the record?

A. The First National Bank of Chicago, the Continental Illinois National Bank & Trust Company of Chicago, the Wilmington Trust Company.

Q. Could you tell us in substance what proportion of the entities entrusted to their care was taxable and which was not?

A. I can only read what is here. This is not my information. I did not obtain it. I would be glad to read it, but——

Q. That is all right.

A. It is not my information. I did not check it.

Q. Did you consider this at all in your survey?

A. No.

Q. You did not use it?

A. No, not consciously, at least. It is very fragmentary information. I could certainly not have paid very much attention to it. It concerned only three banks.

Q. Would you read the first paragraph?

A. (Reading)

[fol. 2673] "These two banks"—refering to the First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago—"own a combined total of 178,657 shares of du Pont common registered in their nominee names; 139,367 shares or 78 per cent of the total are held in trusts with individual beneficiaries, and 39,290 shares or 22 per cent are held for the account of tax-exempt institutions."

Mr. Andrews: I offer that into evidence, your Honor.

Mr. Gribbon: I just want to make something clear:

Cross-examination:—(continued)

By Mr. Gribbon:

Q. You did not prepare this exhibit, Doctor Tepping?

A. No.

Q. Nobody in National Analysts prepared it?

A. That is correct.

Q. You are not prepared to vouch for the accuracy of the information contained therein?

A. That is correct.

Q. Who did prepare it, do you know, actually?

A. I do not know the person that prepared it. I know that it was handed to us by someone whose identity I do not recall now.

Q. Somebody in the du Pont Company?

A. Somebody in the du Pont Company, for our general information early in our negotiations.

Q. Early in your negotiations. Do you recall the purpose for which it was given to you, or the purpose for which you used it?

A. Just general background about the field in which we were to make the study.

[fol. 2674] Q. Was it important for your purposes that the information be accurate?

A. No.

Q. You used it, I believe, before the sample design was prepared, is that correct?

A. That is right.

Q. This entered into your determination as to how to go about the problem?

A. It may have, but it could have had very little weight, since it referred to only three banks.

Mr. Gribbon: I have no objection.

Mr. Burnham: Your Honor, we object to the particular part relating to those banks if it is introduced to show the number of shares actually owned, because it is obviously hearsay and I have no way of knowing whether it is accurate or not.

Mr. Andrews: Your Honor, I am only introducing it to show the fact that it was among his work papers. I am not interested in showing the truth or the accuracy of the statements that appear thereon.

Mr. Burnham: On that basis, your Honor, then we have no objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Government's Exhibit 589.)

Direct examination:—(continued)

By Mr. Andrews:

Q. Dr. Tepping, I hand you Government Exhibits marked 590 and 591, for identification. Do you recognize those?

A. Yes.

Q. Were they among the work papers given to us?

A. Yes.

Q. Will you describe the exhibits for us please?

A. These are of the same character as the earlier exhibits showing the cumulative receipt of the initial mailings. [fol. 2675] These show cumulative receipts, and happen to be for the final day before the tabulations were actually started.

They show the number of Form 3s and 4s that had been mailed up to and including that day, the number of Form 3's and 4's received up to and including that day, all for the main sample, so-called; the total number of shares represented by those completed forms; the number of shares for which no tax data was needed; the number of Form 6s received, and the number of shares represented by those forms.

These are unweighted numbers. The proper weights have not been applied. They were used by me on a daily basis to make decisions about when it would be appropriate to make further follow-ups.

The lower half of Exhibit 591 is simply something that expresses various percentages which might at various times have been indicative to me that certain action was needed in the way of follow-up.

Q. By way of clarification, Doctor Tepping, when you refer to forms 6, et cetera, are you referring to the questionnaires?

A. Questionnaire Form 6.

Mr. Andrews: I offer exhibits 590 and 591, your Honor.

Mr. Gribbon: No objection.

The Court: Admitted.

(Said documents so offered and received in evidence were marked Government Exhibits 590 and 591.)

By Mr. Andrews:

Q. Doctor Tepping, I hand you Government's Exhibits

[fols. 2676-2677] 592 and 593. Do you recognize those exhibits as coming from your work papers?

A. Yes.

Q. Would you describe the exhibits? First describe 592 and then 593.

A. Exhibit 592 is a copy of one of the many work sheets that I prepared in the course of estimating for those shares represented by non-responses the tax and distribution by type of owner.

Q. Okay. Could you describe—oh, were you through, Doctor?

A. Yes.

Q. Could you describe 593?

A. 593 is a letter from National Analysts with a note replying to that letter.

Mr. Andrews: I offer Government's Exhibits 592 and 593.

Mr. Gribbon: No objection.

The Court: They are admitted.

(Said documents, so offered and received in evidence, were marked Government Exhibits 592 and 593.)

Mr. Andrews: That completes the evidence we have.

The Court: Anything further?

Mr. Andrews: We have nothing further.

Mr. Gribbon: We have nothing further.

Mr. Tierney: Nothing, Your Honor.

The Court: Well, the trial is recessed until Monday morning.

(Whereupon an adjournment was taken in the trial of the above-entitled cause until Monday, April 6, 1959, at 10:00 o'clock, a.m.)

[fol. 2678]

Transcript of Proceedings of April 6, 1959

The Court: Counsel may proceed.

Motion of Mr. Carson to Vacate Subpoenas

Mr. Carson: Your Honor, may I approach the Court on behalf of two New York investment bankers who received a subpoena from the Clerk of this Court at four o'clock on

Friday, asking for a great number of documents relating to an issue of Atlantic & Pacific Tea Company, which is not yet closed.

I apply—I have just had the opportunity of advising my friend, Mr. Reycraft, that I would do so—I apply to vacate it as a violation of Rule 45, which, I suppose, is excepted from by an order on file in this court under Clayton Act, Section 20, even under your Honor's order, unduly and unreasonably late—it arrived at four o'clock as the clerks were leaving for the week end; as unreasonable in its scope, because it calls for all studies, reports, analyses, correspondence and memoranda, written, prepared, or received by Smith Barney & Co., or in the other case, Morgan Stanley & Co., both of whom I represent here.

I apologize, your Honor. My firm is Davis, Polk, Wardwell, Sunderland & Keindl of New York, and I advise both of these firms—I have come on last night's plane to address the Court—relating or referring, and the issue involved is a secondary issue offered on March 24, 1959 of 1,800,000 shares of common stock of the Great Atlantic & Pacific Tea Company.

Now they asked for more details. I have a copy that I can hand up to the Court, if that is desired; but my points, your Honor, are very brief, namely, that it is unreasonably and oppressively late. It arrived at four o'clock Friday afternoon, although dated by the Clerk on Thursday.

It is unreasonable in scope; and I further represent to [fol. 2679] the Court on information from Smith Barney & Company, who keep the books on this underwriting, that the books are not closed.

While the offering has been completed, the distribution schedule which my friend, Mr. Reycraft, usually asks for, is not made up and will not be made up for several weeks, because reports are not in from all the underwriters.

And I further would like your Honor to know—and I haven't followed this trial and I have no interest in it—I think your Honor may know that on January 5, 1959, with an adjourned date January 2, 1959, Mr. Emerson of Morgan Stanley & Company was examined by the Government attorneys on deposition on the same issues, I suppose, as are concerned in this particular new financing; and at that time—I happen to know, because I had to do with that—

Morgan Stanley produced, I suppose between 1,000 and 1,500 pages of documents.

Now of course at that time, the March 24, 1959 secondary offering of the Great Atlantic & Pacific Tea Company had not been made. I don't know what the issues in this case are; I have seen it in the newspapers. It may be that there is something peculiar about the Atlantic & Pacific Tea Company offering which Government counsel desire to know for the decree which your Honor is settling; but I ask now to be relieved from this subpoena, which we state is oppressive; and I also, if desired, your Honor, if conduct of this trial permits, will conduct the same kind of deposition in New York where the documents are that was done there with a witness in January.

Mr. Owens: If your Honor please, the subpoena that was addressed to the two firms that Mr. Carson represents, namely, Smith Barney & Company and Morgan Stanley, who are two of the four managers of the 1,800,000 shares [fol. 2680] of stock that were very recently offered to the public by way of a secondary offering. Two of the other managers, namely, Kuhn, Loeb & Company and Carl Loeb, Rhoades & Company, did contact me upon receipt of the subpoena, and we have come to an agreement with respect to production.

They have made a partial production, which I have already received; and in that connection, and in connection with my conversations with them, I excused the personal appearance of the managing partner, who was the person subpoenaed to come to testify concerning the issue, and to produce the documents relating to the issue.

The subpoena presently calls for the production of the witness and the accompanying documents relating to the matter involved, namely, this A&P offering.

We want to go ahead to examine these witnesses in connection with this lawsuit. As your Honor will appreciate from the number of shares involved, the number is very close to the number of shares that would be required to be marketed by the trustee under the Government's proposed final judgment.

It seems that the evidence relating to this issue, the success of these offerings, and so on, is probably among the most highly relevant and closely-related evidence as to the

feasibility of marketing that quantity of stock by secondary offerings as is likely to be available.

Accordingly, we are anxious to co-operate in any way we can in order to facilitate their collection of the documents required.

We, as I say, have received documents—at least in partial compliance, from two of the four of the managing group of underwriters that were involved. Accordingly, I don't think that Mr. Carson's position is justified in re-[fol. 2681] questing that the subpoena or compliance with the subpoena be excused, or that the subpoena be vacated.

The Court: According to what you suggest, could there be at least a partial compliance to this request?

Mr. Carson: Your Honor, in all candor, I must say that we have done our best over the week end to find what we could, and I have in my briefcase some documents which I will informally permit Mr. Owens to inspect; but I don't like to do it under compulsion of an order of this Court. I think it is an oppressive situation. I will give Mr. Owens what I have found.

The Court: Do you suggest passing this matter until two o'clock, or do you want to recess at this time to go over these documents? I would like to have the trial progress.

Mr. Carson: Your Honor, I don't want to delay the trial, with which I have nothing to do. Perhaps Mr. Owens and I can retire and I can show him what I have.

Mr. Owens: Your Honor, I don't think that there should be any question but that these are produced pursuant to the subpoena, your Honor. I don't understand this informality of production.

Mr. Carson: Well, that's all right. I am bringing them because I am a friend of Mr. Reycraft, and now of Mr. Owens. But I don't think it is quite right, sir, to make us do this over the week end.

The Court: Is it practical to recess at this time, or do you want more time?

Mr. Owens: Suppose I discuss it with Mr. Carson and find out what arrangements he can make with respect to the production of the witness who we want to testify concerning the offer.

[fol. 2682] Mr. Carson: Your Honor, no witness has been named.

The Court: There are four lawyers representing the Government. Could one of these Counsel retire with Counsel and inspect these and then we can proceed with something else?

Mr. Reycraft: I would be glad to do that.

The Court: Very well.

Mr. Owens: I have one other matter that I think we should take up at this time. We also have a subpoena addressed to the Continental Bank & Trust Company of Chicago, which is represented by Mr. Tierney's firm, and I wonder if we could get some indication as to the progress they are making on compliance with that subpoena.

As your Honor will recall, it was returnable last Friday; by the close of business on Friday afternoon I received a photostat——

The Court: Is that the matter on which Mr. Barrett appeared here?

Mr. Tierney. That is right, your Honor.

The Court: Do you have any report on that?

Mr. Tierney: Mr. Barrett is handling it. I understand he turned some matters over. I haven't anything to do with it.

The Court: Contact Mr. Barrett.

Proceed.

OFFERS IN EVIDENCE

Mr. Metzger: If it please the Court, we should now like to turn to the subject matter of the stockholders of du Pont, Christiana and Delaware, and the effect of the Government's plan and/or the du Pont plan upon the stock holdings of these individuals and companies and what each plan [fol. 2683] would mean with regard to the effective control of General Motors.

It is the Government's contention that the General Motors stock attributable to Christiana and Delaware and the stockholders of Delaware must be sold in order to bring about the restoration of competitive conditions.

Defendant du Pont has offered as a substitute a voting pass-through.

One of the end products of the subject matter we are about to discuss is the effect of such a voting pass-through; who would have what amount of vote in General Motors.

It is our contention that the amount of stock in the hands

of a limited number of people related not only in a community of financial interests but in a community of blood, is too large a percentage or is such a large percentage as would amount to effective control of a corporation as widely held as General Motors.

In preparing the material for determination of this fact, the Government, Mr. Ludlow and myself, have worked very closely with Mr. Scott and his team for Christiana, and I would like to say that the cooperation on both sides has been splendid.

The attempt has been made to get to the facts, and nothing more. Nonetheless, the subject matter is a very complicated one, and there are a number of companies involved.

Much of the work has been done over the last five or six weeks, and there are some subject matters that are still not finally settled. Accordingly, Mr. Scott and I have agreed that the matter presented by the Government and by counsel for Christiana today will be, with the Court's permission, left open for correction of minor details which may [fol. 2684] prove at a subsequent date to have been in some respects inaccurate.

In presenting the Government's case, I have prepared a folder which is before the Court. If you would turn to the first exhibit, you will find it numbered for identification Government Exhibit 594. I will ask the reporter to so mark it.

(Thereupon said document was marked Government Exhibit 594 for identification.)

Mr. Metzger: Government Exhibit 594 for identification is the reply of the Renappi Corporation to a request for a stockholder list of that corporation.

As you may see, from the form of the document itself, it is a Ross family corporation in which Wilhelmina du Pont Ross is a majority stockholder.

I might say in relation to these next five or six documents that are all along these lines, where you have one individual having a majority of the stock; if the corporation itself owns stock in another corporation, that stock in the second corporation should be treated as a whole rather than ascribed to the individual stockholders of the holding company, since the holding company, being the owner of the

stock, is voted in accordance with the wishes of its majority stockholders.

I will ask the reporter to mark the next document as Government Exhibit 595 for identification.

(Thereupon said document was marked Government Exhibit 595 for identification.)

Mr. Metzger: The second document, Government Exhibit [fol. 2685] 595 for identification, is the Nemours Corporation, a Dean family corporation.

Once again, the majority of the stock here is held by Paulina du Pont Dean.

I will ask that the next document be marked Government Exhibit 596 for identification.

(Thereupon said document was marked Government Exhibit 596 for identification.)

Mr. Metzger: Government Exhibit for identification No. 596 pertains to the Naed Corporation, another Dean family corporation in which Paulina Dean again has a majority stock interest and her husband has the remainder.

The next document is Government Exhibit 597 for identification.

(Thereupon said document was marked Government Exhibit 597 for identification.)

Mr. Metzger: Knollwood, Inc. is the fourth item, Government Exhibit No. 597 for identification.

This is, as may be seen from a rapid examination, a Carpenter family organization. That is, Margaretta du Pont Carpenter and her late husband, Robert R. M. Carpenter.

The next document is Government Exhibit for identification No. 598.

(Thereupon said document was marked Government Exhibit 598 for identification.)

Mr. Metzger: Government Exhibit for identification No. 598 deals with the Glenden Land Company, which is a Laird family company. This stock is held by the various members of the Laird family, descendents of Mary Laird, a sister of Pierre du Pont.

[fol. 2686] The next is Government Exhibit No. 599 for identification.

(Thereupon said document was marked Government Exhibit 599 for identification.)

Mr. Metzger: Government Exhibit 599 for identification, the next document, is simply a repeat of the facts in Government Exhibit 598, with the addition of the relationship of each of the individuals to the founder of the stock interest, that is Mary Alletta du Pont Laird.

Mr. Scott: May I interrupt one second, Mr. Metzger?

If your Honor please, there will be several instances following where they have described individuals by relation to another individual.

I have no objection to that on the understanding that we will be able to put in a showing of what the full relationship is. It that correct?

Mr. Metzger: Yes. Mr. Scott is preparing an exhibit which shows an ancestor and each of his descendants in a chronological order.

Mr. Scott: The point is, I simply want the record to be clear as to who Mary Alletta du Pont Laird is as well as Mary Laird Downs.

Mr. Metzger: Of course.

The next document is Government Exhibit 600.

(Thereupon said document was marked Government Exhibit 600, for identification.)

Mr. Metzger: Government Exhibit 600 is a letter from William du Pont, Jr. in response to a request made by the Government to Mr. Potter, his attorney, as to the stockholders of the Hopeton Holding Company.

[fol. 2867] The Hopeton Holding Corporation is a corporation owning 23,300 shares of the common stock of the Delaware Trust Company, and Mr. du Pont is indicating in this letter that the entire common stock is held under the will of his father, William du Pont, by the Delaware Trust Company, as trustee.

Now, we have the will of William du Pont. It is a stipulated document, and under it, William du Pont, Jr. and his sister, Marion du Pont Scott, are life beneficiaries after certain specific bequests, of 60 and 40 per cent, respectively, of the will's trust corpora.

The next document is Government's Exhibit 601, for identification.

(Thereupon said document was marked Government Exhibit 601, for identification.)

Mr. Metzger: Government exhibit for identification No. 601 is a response from the trustees for Murton du Pont Carpenter, as to the securities contained in the trust for Murton du Pont Carpenter.

The Court might note that W. Sam Carpenter III, George T. Weymouth, W. Glasgow Reynolds, and C. Porter Schutt, the four trustees, are the four sons-in-law of Eugene E. du Pont.

Next is Government Exhibit No. 602 for identification.

(Thereupon said document was marked Government Exhibit No. 602, for identification.)

Mr. Metzger: Item No. 602, Government Exhibit for identification No. 602, is simply a list of the common stock outstanding of the six corporations with which we will be concerned today—General Motors, du Pont, Christiana, Delaware Realty, Delaware Trust and Wilmington Trust. [fol. 2688] Mr. Scott: Mr. Metzger, I want it understood, we have not checked these figures. I take it it is subject to correction.

Mr. Metzger: Any figure or fact recited in either the Government or the defendants' presentations is subject to the correction that I outlined before.

Christiana Securities, Delaware Realty and Delaware Trust all have had for a number of years the same number of shares outstanding, whereas General Motors and du Pont created some problem as to what point of time you might select in order to determine the number of shares outstanding.

Corporations of this size and nature generally are constantly issuing stock. It was felt in order to best reach the number of shares outstanding as of any given date to take, as Mr. Scanlon indicated in his testimony that A T & T does, the average number of shares outstanding as of the last year for which records are available, and that is what we have done in this instance.

From these figures one would be able to ascertain the percentage of the outstanding stock of the various companies in question that is controlled by the people listed in each document relating to each company's shareholdings.

The next document is Government Exhibit No. 603 for identification.

(Thereupon said document was marked Government Exhibit No. 603 for identification.)

Mr. Metzger: The next document Government Exhibit for identification Number 603, is entitled, "Stockholders of Delaware Trust Company," which is an extract from the stockholder list of that company.

[fol. 2689] Mr. Scott: Mr. Metzger, does this purport to be a complete stockholders' list?

Mr. Metzger: No, it is an extract from the stockholder list.

As you will see from Government Exhibit for identification, No. 602, there are 40,000 shares outstanding of the common stock of Delaware Trust Company.

This document, which contains 30,588 shares, relates solely to those individuals who are in some form related to either the founders of the original powder company or to the eight brothers and sisters. In this event, it is the powder company group.

Mr. Scott: But to get straight what it means on its face, this does not purport to be the complete list of stockholders?

Mr. Metzger: It does not. As you will see from examining one document against the other——

Mr. Scott: I accept your statement. May I also have a stipulation from you that the material contained in the brackets or parentheses is not part of the stockholder list.

Mr. Metzger: I would accept that so long as it is understood that this is also a stipulated matter.

Mr. Scott: You mean the fact?

Mr. Metzger: The fact.

Mr. Scott: Well, that is stipulated subject to correction and subject to——

Mr. Metzger: Each of the facts.

Mr. Scott: To our putting in fuller explanation——

Mr. Metzger: Yes.

[fol. 2690] Mr. Scott: But it is understood between us, there is nothing in the stockholder list that pertains to the relationship.

Mr. Metzger: That is correct.

Mr. Metzger: Now, as I indicated earlier to the Court, the Hopeton Holding Corporation was a corporation owned

by William du Pont, Sr. If you will note toward the bottom of the first page, on 603, you will see that 23,000 shares of the outstanding stock of the Delaware Trust Company is held by the Hopeton Holding Company.

William du Pont, Jr., is the President of the Delaware Trust Company, and he, his sister, Marion du Pont Scott, and the Hopeton Holding Company own between them almost three-quarters of the outstanding stock of the Delaware Trust Company.

This becomes significant, if it please the Court, when we relate the holdings of non-family individuals who have trusteed their stock in any one of the three companies in question with the Delaware Trust Company. This subject will be touched on more broadly when we reach individual companies.

The next document is Government Exhibit for identification 604.

(Thereupon said document was marked Government Exhibit 604, for identification.)

Mr. Metzger: This is in terms a shareholder list of the holders of capital stock in Delaware Realty and Investment Company. With the exception of the material in parentheses, this document is a copy of a shareholder list of the Delaware Realty and Investment Company as of Febru- [fol. 2691] ary 24, 1958, the last date at which a complete stockholder list was issued by the company.

Now, both Counsel for the defense, Mr. Scott and myself, have attempted to get later data as to the Delaware Realty and Investment Company, and Mr. Scott conducted a survey of the stockholders of the Delaware Realty Company in which he attempted to ascertain who at that time, a date subsequent to February 25, '58, owned each of the shares or had beneficial interests in each of the shares.

I was unable to ascertain as of last Friday, when we had to go to press with these items, the facts under the material being gathered by Mr. Scott. In other words, there were discrepancies of a serious nature between one piece and the other. I understand that subsequent to that Mr. Scott has resolved whatever problems were left, but this is the only, shall I say, official stockholder list of the Delaware Realty & Investment Company outstanding.

Mr. Scott: So that the record may be clear, would you give the date, as of what date this was?

Mr. Metzger: February 24, 1958.

Mr. Scott: I am sorry. I missed that. There is one other thing: Do I understand you are representing that this is the precise copy of the stockholder list that was submitted to you——

Mr. Metzger: Yes.

Mr. Scott: (Continuing) Except for the material in the parenthesis?

Mr. Metzger: Yes.

Mr. Scott: Now, I call the Court's attention to Page 5 of that document and in the parenthesis under, for example, [fol. 2692] "Laird & Company Corp." there is a characterization, "Laird Family Corp."

I suggest that that cannot be competent evidence of that fact.

You put in the facts with respect to the stock holdings, haven't you?

Mr. Metzger: Yes.

Mr. Scott: Or you have them. I think that that ought to be excluded. I am not stipulating to that characterization. Under Longwood Foundation, "du Pont Family charitable corporation," to the extent that that is offered for some kind of probative value, I cannot stipulate to that and do not and I object to it.

Mr. Metzger: Well, if it please the Court, the first is the Laird & Co. Corp. The facts are not in the record as of the moment as to the stock holdings of Laird & Co. Corp. I suggest that Mr. Scott and I insert that at a later date.

Mr. Scott: No; what I am objecting to is this characterization on this document. You can argue anything you want.

Mr. Metzger: You are objecting, sir, to the characterization, as I take it, as a fact?

Mr. Scott: I am objecting to you putting this in as evidence of this fact. It is not competent.

Mr. Metzger: Well, if we are unable to reach a stipulation as to the fact, I would suggest that, in order to make matters move more smoothly, that we put into this record or insert in the record at a later date in support of this statement——

Mr. Scott: No.

[fol. 2693] Mr. Metzger: (Continuing)—or in opposition to the statement if you feel the facts demonstrate otherwise, a statement of the stock holdings of the Laird Family Corporation.

Mr. Scott: I am attempting to preserve the integrity of this record. You can put in all the facts you want about Laird & Company, but whether you then call it a Laird family corporation is a conclusion.

The Court: Yes, it is a conclusion. Let's take the first one. It has been designated as a family corporation. That would be Laird, wouldn't it?

Mr. Scott: Yes.

The Court: Laird & Co. Corp., Laird Family Corporation. Well, are there any stockholders of that corporation other than the members of the Laird family?

Mr. Metzger: I believe there are a few of the officers and directors.

Mr. Scott: That is the problem, your Honor.

The Court: What interest do they have? Who owns the majority interest, and so forth?

Mr. Metzger: Well, I suggest if——

The Court: Oh, I think——

Mr. Metzger: (Continuing)—if Mr. Scott wants that stricken, I would not object to it so long as we will agree to insert in the record at a later date the stockholdings of the Laird & Company Corporation.

Mr. Scott: You may put that in, I have no objection.

The Court: That is factual. That is all right. This is a conclusion.

[fol. 2694] Mr. Metzger: Now, as far as the Longwood Foundation, Incorporated, objection goes, I do not feel that that has any real substance. We have already inserted into the record a list of the officers and directors of Longwood Foundation. There is no question but what all the stockholdings of Longwood Foundation, Inc., are gifts from Pierre's Estate, and some, I think, from——

The Court: Does your objection extend to the Longwood Foundation?

Mr. Scott: It does, your Honor.

There, again, I have no objection to the facts, putting in all the facts.

Mr. Metzger: I believe that is no more than a statement of fact, if it please the Court.

The Court: I think Counsel can work this out by agreement. If you can't, well, then present the facts.

Mr. Metzger: Well, if it please the Court, as to this, a statement is made, "du Pont Family Charitable Corporation—Pierre's Estate."

Now, the fact is that Pierre left a goodly sum of stock in a number of corporations to the Longwood Foundation, Inc.——

Mr. Scott: Put in that fact, I have no objection.

Mr. Metzger: (Continuing)—which was created from his estate and which has been supported in addition by other members of the du Pont family. I do not think this is a characterization, I think it is a statement of fact.

The Court: Well, let's pass this exhibit and hold a conference to see if you can agree on something. If you can't, I will rule.

[fol. 2695] Mr. Metzger: All right, your Honor.

You will note, sir, in relation to 604, the shareholder list of the holders of capital stock in Delaware Realty and Investment Company, that there is some overlapping in this document.

If you will turn to page——

The Court: Pardon me, which one are you referring to?

Mr. Metzger. 604, Judge.

The Court: Oh, the same one?

Mr. Metzger: Yes.

If you will turn to page 6, you will note that from page 6 to the end of the document it refers to trusts in the Wilmington Trust Company.

Now, this subject-matter is covered again in documents relating to the trust holdings of the Wilmington Trust Company of various individuals.

There is an overlap to that extent, and also this document does not agree precisely, as to the holdings of Wilmington Trust Company, with the extracts from the trust instruments of the Wilmington Trust Company.

That is unavoidable due to the different times at which these documents were prepared. The trust instruments were as of March 4, 1959; the stockholder list is as of February 24, 1958.

Turning now to Government Exhibit for identification 605.

(Thereupon said document was marked Government Exhibit 605, for identification.)

[fol. 2696] Mr. Metzger: This is an extract——

The Court: From Wilmington stock——

Mr. Metzger: Wilmington stockholder list up through page 5 of the document.

This lists individuals who are stockholders of the Wilmington Trust Company who are listed on the stockholder list of the Wilmington Trust Company as of March 4, 1959, and in parenthesis, again, the relationship of each of these individuals to the parties indicated earlier is pointed out.

Now, at the bottom of Page 5 of the Government Exhibit for identification 605 are listed six companies which are listed on the stockholder list of the Wilmington Trust Company as direct stockholders. These I have categorized in a subheading, "Family Corporations," just as I have categorized the previous group as individuals and the title as, "Extract from Wilmington Trust Stockholders List."

Mr. Scott finds some objection to my saying "Family Corporation," and I am willing to make the record show at this point that none of the headings or sub-headings, or, indeed the matter in parenthesis is from the stockholder list of the particular company.

Further, that the characterization of family corporations listed here need not rest upon this characterization but on independent evidence.

Now, on Page 6 of this document are listed four trusts of the Bank of Delaware. This does not purport to be from the stockholder list of the Wilmington Trust Company, and perhaps should be physically detached from the document headed 605. Now, I do not think that is particularly important.

[fol. 2697] Both sides have examined or, if they have not they can, each of these instruments and ascertained that the four individuals are the trust beneficiaries of trusts in the Bank of Delaware of the number of shares indicated.

Now, on the bottom of that page headed, "Delaware Trust Company Trusts" is a summarization of a later document. I think we should pass that summarization until we discuss the material in the later document.

Mr. Scott: Well, let me ask you, are you offering this entire document or identifying the pages?

Mr. Metzger: I have identified it and I will offer it at the conclusion.

Mr. Scott: Well, I have several things that trouble me about this, your Honor. This is something that is headed, "Extract from Wilmington Trust Stockholders List." There is obviously material beginning on Page 5, which is not in fact an extract from the stockholders list.

Mr. Metzger: Not materially, the heading, is that correct?

Mr. Scott: Well, is in fact Christiana Securities Company listed on the stockholders list for 34,000 and all the others?

Mr. Metzger: Yes.

Mr. Scott: Certainly the totals are not extracts from the stockholders list.

Mr. Metzger: That is right.

Mr. Scott: I suggest, your Honor, that for purposes of keeping the record clear, this should not be introduced as extract from Wilmington stockholder list unless in fact it is. I am perfectly willing to stipulate——

[fol. 2698] Mr. Metzger: If the Court please, the document is an extract. The sub-headings, just as the heading at the top, "Extract from Wilmington Stockholder List" and the word "individuals" are not an excerpt, obviously, but it is an attempt to make it easier to read.

The Court: They can be deleted.

Mr. Scott: And as to the material on Page 6, which does not purport to come from the stockholders list, as I undersand it——

Mr. Metzger: Yes.

Mr. Scott: I should think that for purposes of clarity that ought to be at least introduced separately and we can deal with those things separately.

Mr. Metzger: Well, do you have any question as to the facts?

Mr. Scott: As to first the Bank of Delaware Trust I am assuming that we can check those and get together on them but, again, I think preferredly they should not be included as though they were a part of the stockholder list of Delaware, which is the basic evidentiary material.

Mr. Metzger: Well, they are not. I think I made that clear. The reason why it is here, I might explain to the Court—we are coming to this problem anyway—the stock-

holder lists will very rarely list a trust as such, so a stockholder list of, let us say the du Pont Company, may list ten or twelve in their 1,000 or more shareholder list, may list ten or twelve specific trusts, and then under the name of a nominee of the trust company, such as Lack & Lindsay and Mertz & Moyer for Wilmington Trust Company, or Potts & Co., for Delaware Trust Company, you will find listed a large number of shares.

[fol. 2699] You must go behind this large number of shares in order to ascertain the persons to whom this stock is attributed.

Now, the same thing exists for the Bank of Delaware, but the problem was not as large, because as you can see there are only four names listed. The other two companies are accordingly Wilmington Trust Company and Delaware Trust Company, in separate exhibits, which develop the facts with relation to those.

Mr. Scott: Just let me interrupt. Understand, I have no objection to your reference to the particular trust instruments and the facts that they show. I have no objection to that at all. You can put that in.

But I think it is wrong for you to put it in as though your evidence is that it comes from the extract of——

Mr. Metzger: Well, I believe I made it clear.

The Court: I think those portions not taken from the record should be deleted. That would simplify it.

Mr. Metzger: Well, your Honor, both parties are in agreement to the fact that these persons have the beneficial interests in this stock. The objection of Mr. Scott is not to the facts, but to the juxtaposition of the Bank of Delaware Trusts to the terminology at the beginning page, extract of Wilmington stockholders list.

Now, if the Court prefers, we may physically separate this page, although that will again apparently complicate a matter that is already split over three or four documents, and head that "Bank of Delaware Trusts in Wilmington [fol. 2700] Trust Company Shares which are held by the Individuals Named."

I have no objection to that; it is merely that it complicates an already diversified record on the subject of stockholders' stock.

Mr. Scott: It is a question of what your evidence is.

Mr. Metzger: If the Court would prefer, that document may be physically detached and given a separate heading; although as to the fact of the stockholders in Wilmington Trust Company, it belongs with the stockholder list of the company.

Does the Court prefer the last?

The Court: Yes, I think it should be detached.

Mr. Metzger: The next document, Government's Exhibit for identification 606, is a tabulation for the succeeding documents.

If I may explain what was done by counsel for both sides—where you had a trust in the Delaware Trust Company or in the Wilmington Trust Company, it became material to determine who voted the stock of these various companies. Let us say we had a Wilmington trust for a thousand shares of du Pont—the question arose, who voted the stock. And that must be drawn from the terms of the instrument, and that was done by agreement. The number of different ways that the stock might be voted was limited to four; and each of these four were ascribed to each trust instrument.

Some 800 trust instruments were originally gotten on subpoena from the Wilmington Trust Company. As to type "1," the trust company itself would have the vote; in [fol. 2701] type "2," the trust company may vote subject to veto by adviser.

If I may remind the Court on that proposition, a good deal of evidence was had in the original trial as to the fact of the usage of adviserships and as to the meaning and the impact of the advisers' activities.

Without going into the record for it, I suggest that with regard to the adviser and joint trustee, that perhaps an examination of the original record might point out the rather nominal relationship of these parties to stock, as far as the individuals in the du Pont families are concerned. Category "3" is where the trust company has no say in the voting of the stock. It is usually an agency account, but many of these agency accounts are agency accounts for members of the du Pont family under consideration here, and further information was needed besides the vote.

The next heading is "Allocation." That is the allocation of stock dividends between principal and interest. The subject has received some prominence in this hearing, and

it was felt that it might be useful to examine the 800 trust instruments that we had and select certain provisions with regard to allocation which might be said to stand for each other provision contained therein.

So there are twenty-nine allocation provisions listed in this document. These may have represented perhaps seventy-five to one hundred slightly varying bits of language, but I would like to discuss each of these allocations very generally and point out to the Court how minute those variations must have been.

Mr. Scott: May I just say, so that the record can be clear—as I understand this proposed exhibit, the material con-[fol. 2702] tained under the allocation column represents provisions that would have been present in at least one or more of the trusts that you examined—one or the other of the twenty-nine different provisions relating to the problem?

Mr. Metzger: That is correct

Now I might add that the twenty-nine provisions listed herein are listed at the request of counsel for the defendants; that there has been no attempt on the part of either party to interpret these documents, these clauses.

Now, just briefly running through them, you will find that there are some few which do definitely create some, no matter how vague, litigable problems. The first allocation provision might cause some concern among counsel; the second might; the third is very clearly a matter of choice with the trustee, as is the fourth and the fifth. The sixth, again it is quite clear that this is principal, that the stock dividends referred to here in General Motors stock, without being too much of a lawyer——

Mr. Scott: Mr. Metzger, I think—is this argument now?

Mr. Metzger: Yes.

The Court: I was going to suggest that the Court is going to have to read this, anyway, and I don't think it is necessary to go into this.

Mr. Metzger: Let me point out, your Honor, that as to all of these documents, as to all of these causes, the differences are non-existent. As to many of them, a determination can be made.

Q. If the Court will turn temporarily to Government Exhibit for identification 612——

Mr. Scott: Which one is that, Mr. Metzger?

[fol. 2703] Mr. Metzger: This refers to the 800 instruments that we received early in the hearing and which we examined with relation to voting provisions and allocation. The "V" about three-quarters of the way across the heading list is for "Vote" and allocation, the following item, if you run down the list a few pages you will see the references to the different allocation provisons.

From this document you can ascertain which of the allocation provisions—how many shares come under each allocation provision and how many instruments utilize each allocation provision.

That proposition will be developed further in the brief.

Turning to Government exhibit for identification 607, this is a list of trusts in the Wilmington Trust Company, in the stock of Christiana, Delaware Realty and Investment Corporation, and the Wilmington Trust Company. This is one of several separate documents, and the reason for its separateness is that the original Government subpoena requesting the trust instruments from the Wilmington Trust Company, shown in Government's Exhibit for identification 612, for some reason was deficient and did not pick up each and every trust that held the stock of Christiana and Delaware.

Therefore, last week counsel for Christiana and counsel for the Government went to Delaware and made an extract of the remaining trust instruments containing these shares, this time not going into allocation provisions, solely because of the limitation of time, being on Thursday and Friday, and it was necessary to cut a few corners.

Mr. Scott: Could I just comment briefly here?

Mr. Metzger: Surely.

[fol. 2704] Mr. Scott: This is the beginning of a series of exhibits of this character, which are in form a summary of some of the provisions of the trusts that were produced pursuant to subpoena.

We have no objection to these summaries, except on the ground of incompleteness.

Now, as I understand it, Mr. Metzger has agreed that we shall put in the additional material, keyed to the same trusts that we want to put in. On that understanding, I have no objection to these exhibits.

Mr. Metzger: Turning to 607, we see a heading, "Account Number," and under that a list of the varying num-

bers of different magnitude. These numbers are the account number as ascribed to the document by the Wilmington Trust Company. Both Christiana and the Government will use these account numbers to identify specific trusts.

The Government has listed the grantor, joint trustee, if any, adviser, if any, the voting provision, and the number of shares in any one of the three companies indicated, the symbol "C" standing for Christiana, "W" for Wilmington, and "D" for Delaware Realty and Investment Corporation.

Now, Mr. Scott made the statement that he wanted to put in some material that would make this more complete.

Well, I have no objection to Mrs. Scott putting in anything he chooses, so long as it is accurate, with relation to these trust instruments; but I would like to point out that this document indicates who granted the trust, who votes it, who advises it, and the number of shares.

The Court: I suggest that you reserve that argument [fol. 2705] until you have made the offer; and if you have an objection——

Mr. Metzger: I have no objection, if your Honor please.

Mr. Tierney: If the Court please, may I interrupt for a minute?

May I have some idea as to about how long you are going to take for this presentation, Mr. Metzger?

The Court: I don't think this is going to take long.

Mr. Metzger: We will finish this morning.

The Court: I think there is too much detail in describing some of these things, counsel.

Mr. Metzger: Very well, your Honor. With relation to this, if the Court please, I merely want to point out that I do not object to Mr. Scott's presentation; I merely say that for the purpose of determining voting power and control, which is the subject matter that we are trying to reach, as far as the General Motors Corporation is concerned, that this document contains all the information we need.

Turning to Government's Exhibit for Identification 608, this is a list of the number of shares of Wilmington Trust Company held in trust by the Delaware Trust Company, and it is in the same form as the previous document for the Wilmington Trust Company stockholders' trusts, in its own stock and in the stock of Delaware and Christiana.

Turning to Government's Exhibit for identification 609, this is another list of Wilmington shares held by the Wil-

mington Trust Company. The reason why it is separate from the other trusts is that each of these accounts listed here are accounts that were previously covered in the original subpoena addressed to Wilmington Trust Company and covered in Government's Exhibit for identification 612. [fol. 2706] However, that subpoena did not ask for Wilmington shares held in trust, and in compliance with our request that they give us that information, the Wilmington Trust Company, for those documents where we already had the instrument but did not have the Wilmington shares, merely supplied the account number and the number of Wilmington shares attributable to that account number; so if you wanted to refer more specifically—for example, pick up advisers under these accounts, you could turn to Government's Exhibit 612, which covers the same instruments, plus a number of others.

(Thereupon said documents were marked Govetnment's Exhibits 606 to 609, inclusive, for identification.)

Now, that completes the list of documents that contain Wilmington Trust Company shares.

Although the subject will be covered more thoroughly in brief, I would like to point out that in fact, in direct holdings and in trusts created by members of the du Pont Company as we found this morning, roughly 26 per cent of the stock of the Wilmington Trust Company, was either held directly or in trusts created by or for members of the du Pont family.

Aside from that——

Mr. Scott: I object to this, your Honor. You haven't put in competent evidence of this fact. This is argument.

Mr. Metzger: No, I disagree with that. I have put in, in a number of different forms, information with regard to the shareholdings of Wilmington.

Mr. Scott: Let it stand on its own face.

[fol. 2707] Mr. Metzger: I am presently developing a statement which will lead up to further matter on which I request stipulation.

Further trusts in the Delaware Trust Company exist over which the Delaware Trust Company and its owners have certain measures of control, and certain other facts should be noted with relation to the Wilmington Trust Company.

Mr. Tierney: If the Court please, I think counsel should be sworn if he is going to testify.

The Court: Yes, I think you are getting into argument.

Mr. Metzger: If it please the Court, we are requesting a stipulation.

First, the Wilmington Trust Company is physically located in the du Pont building——

Mr. Scott: As far as I know they have one office there. I don't know if they are located there.

Mr. Metzger: All right, subject to counsel's determination.

Second, the following members of the family of the eight brothers and sisters of Pierre du Pont are employed in one capacity or another by Wilmington Trust Company.

Mr. Scott: What source are you reading from now?

The Court: Are you now asking counsel to stipulate to this fact?

Mr. Metzger: Yes, I am, your Honor. This is a document that they prepared. I am not sure at this point whether they intend to put it in. They indicated last night that they probably would not.

[fol. 2708] Mr. Scott: I will stipulate as of the date of this exhibit whatever appears on here with respect to their relationship.

Mr. Metzger: George P. Edmonds, president, Wilmington Trust Company——

Mr. Scott: That I happen to know has been changed since the document was made out.

Mr. Metzger: All right. We will demonstrate what the fact is later and make that correction.

Lammot du Pont, Jr., employed by the Wilmington Trust Company,

Mr. Scott: State what it states.

Mr. Metzger: Lammot du Pont, Jr., occupation, Wilmington Trust Company.

Mr. Scott: Wait a minute, where does it say that?

Mr. Metzger: Right here.

Mr. Scott: All right.

Mr. Metzger: J. Simpson Dean, Jr., occupation, Wilmington Trust Company.

Donald P. Ross, occupation, vice president, Wilmington Trust Company.

Donald P. Ross, Jr., occupation, Wilmington Trust Company.

I believe that completes the Wilmington Trust Company list.

The final fact upon which I ask stipulation, the fact of the financial relationship existing between E. I. du Pont de Nemours and Company and the Wilmington Trust Company, namely, the fact which I do not have at this time as [fol. 2709] to the average account of E. I. du Pont de Nemours and Company in the Wilmington Trust Company.

Mr. Gribbon: What are you asking, as to du Pont balance?

Mr. Scott: I don't know.

Mr. Metzger: The fact will be ascertained.

Mr. Gribbon: We don't know. You haven't asked us to stipulate to anything like that.

Mr. Metzger: I am now asking you.

Mr. Gribbon: We will have to get the figures. We can't do it here this morning.

Mr. Metzger: Fine. I am not asking you to do so.

The next document is Government's Exhibit 610 for identification.

(Thereupon said document was marked Government's Exhibit No. 610 for identification.)

Mr. Metzger: The next document, Government Exhibit for identification No. 610, is entitled, "Excerpts From Christiana Stockholding List."

Mr. Scott: Your Honor, this particular exhibit presents in very aggravated form the problem we had before. It is entitled, "Excerpts From Christiana Stockholding List"——

Mr. Metzger: If I may finish, Counsel.

Mr. Scott: Excuse me one second.

If your Honor will turn to page 11, presented as representations on the Christiana stockholding list you have the Wilmington Trust Company list, a family corporation, and I object to it. It isn't true.

[fol. 2710] Mr. Metzger: May I continue, Counsel?

Mr. Scott: I again suggest that this ought to be limited to the excerpts.

The Court: Well, that is not taken from the records, so we will leave it——

Mr. Metzger: Turning to Government Exhibit for identification No. 610, it is entitled "Excerpts From Christiana Stockholding List," and as in the previous document, the individuals listed are listed as taken from the stockholding list with the exception of the stipulated relationships in parentheses, starting on page 11 of that document, again the subtitle, as all of these subtitles, is not part of excerpts from the stockholding list.

The fact is the Carpenter Foundation, Inc., is listed as a stockholder. The Chichester du Pont Foundation is listed as a stockholder, are are the remaining three companies.

The fact of the relationship between each of these five companies and the members of the du Pont family must be and will be, and to some extent has been, separately proven and identified. There is no attempt in any one of these documents to indicate that the subtitles are contained in the stockholding list of Christiana.

Mr. Scott: It is certainly offered for some kind of probative value.

Mr. Metzger: What probative value do you find in the word "individuals," sir?

Mr. Scott: Don't argue with me about that. The point is—

The Court: Counsel, this is very simple. You start out the exhibit with the title, "Excerpts From Christiana Stock-
[fol. 2711] holding List." On page 11, you have "Family Corporations." Now, is "Family Corporations" an excerpt?

Mr. Metzger: No, neither is individuals.

The Court: That is what Counsel is complaining about.

Mr. Scott: That is right

The Court: If you designate this as excerpts from the record, it should contain only what the record shows.

Mr. Metzger: Do you want me to delete individuals on the first page?

The Court: No, "Family Corporations."

Mr. Metzger: What difference is there between the word "individuals" and the words "family corporations?"

The Court: Because the exhibit doesn't speak the truth. It is not an excerpt.

Mr. Metzger: Neither is the word "individuals," nor is the word "excerpts."

The Court: It is all very simple.

Mr. Metzger: All right. We will take out both words, if the Court desires.

Now, the next group on the same page 11, again headed, or entitled, "Delaware Trust Company." This is the simple proposition that existed in the Wilmington stock, namely, in the main these for Delaware Trust Company and Bank of Delaware on the next page, are extracts from trust instruments of the companies listed.

Again, if the Court prefers, I shall have this group physically separated from the rest of the excerpts. Counsel will stipulate to the facts cited. I think his objection is solely to the juxtaposition.

[fol. 2712] Mr. Scott: What are you asking me now?

The Court: Is there any objection to the present form?

Mr. Scott: Well, as I understand your Honor's ruling, so far as this document is concerned, it is to be limited to what is actually in the stockholding list.

The Court: That is correct.

Mr. Scott: Now, you are asking me, Mr. Metzger, for what?

Mr. Metzger: If you—well, if that is your understanding, then this group will be separately listed.

Mr. Scott: Which group, the Delaware Trust Company?

Mr. Metzger: Delaware Trust Company and the Bank of Delaware will be separately listed in the Government exhibit.

Mr. Scott: And if, in fact, this describes the trust, why, then I will have no objection.

Mr. Metzger: Each of those trusts and all the material I have on that has been examined by your people.

Mr. Scott: That is all right, if that is correct.

The Court: All right. You understand the Court's ruling.

Mr. Metzger: We will refer to that as Exhibit 610-A then.

The next document is Government Exhibit for identification 611.

(Thereupon said document was marked Government Exhibit 611 for identification.)

[fol. 2713] Mr. Metzger: Government Exhibit for identification No. 611 is entitled, "Extract from du Pont 1000 or More Shareholder List."

I should like to make a correction here, if I may, or rather an addition. On the second page is listed the name Elise H. du Pont, and under it there is no indication of relationship.

I understand from counsel for Christiana that Elise is another name for Elizabeth Hayward du Pont.

Mr. Scott: I don't know that. We will check that.

Mr. Metzger: Upon ascertaining the relationship, we will insert it.

Now, through Page 7 of this document, although it does contain some trusts, these are trusts which are listed on the stockholder lists as such, and the terminology used under the trust is that in the stockholder list of du Pont's 1000 or more shareholder list. I presume that in this instance counsel has no objection to the use of the sub-title, "trust."

Mr. Scott: No, because that is in the stockholder list.

Mr. Metzger: I know.

Now, the Bank of Delaware trusts again should be separately headed.

I might point out here that some of these trusts in the Bank of Delaware are listed separately in the stockholder list. Nonetheless, I think in order to show Bank of Delaware holdings in a group, we should list them together, if counsel has no objection. For example, the Bank of Delaware trust of Amelia E. du Pont of 152,924 shares is listed in a list of the stockholders. However, for clarity's sake, I think we should separate it with the Bank of Delaware [fol. 2714] trusts and list it separately as Government Exhibit for identification No. 611-A.

Mr. Scott: That is beginning on Page 8, Mr. Metzger?

Mr. Metzger: Yes.

Mr. Scott: All right.

Mr. Metzger: Government Exhibit for identification No. 612 is the next document.

(Thereupon said document was marked Government Exhibit No. 612, for identification.)

Mr. Metzger: Government Exhibit for identification No. 612 is entitled, "Wilmington Trust Company," and contains the 800 trusts originally supplied by the Wilmington Trust Company in response to subpoena of the Government, and sets forth some of the trust instruments containing Chris-

tiana and Delaware Realty and Investment Company stock, and all of the trust instruments containing du Pont stock held by the Wilmington Trust Company.

As I explained before with relation to Delaware, the account number is the account number of the bank. The grantor, where the name is considered significant, is listed. Where the name is of a non-family member or non-family related, the name is deleted and simply an "X" is used.

Joint trustee, if any, if a family member, is listed. Adviser, if any, if a family member, is indicated.

The vote is indicated in accordance with the symbols contained in a previous Government exhibit. Allocation, du Pont is abbreviated "D.D."; Christiana is abbreviated as "C," and Delaware, Delaware Realty and Investment Company, is abbreviated to "D."

[fol. 2715] The next document is Government Exhibit 613 for identification.

(Thereupon said document was marked Government's Exhibit 613, for identification.)

Mr. Metzger: Government Exhibit for identification No. 613 is headed "Delaware Trust Company," and shows the Delaware Trust Company trusts in du Pont and Christiana shares.

Again, the number on the left hand side is the trust company's symbol for that particular account.

Next is Government Exhibit 614 for identification.

(Thereupon said document was marked Government's Exhibit 614, for identification.)

Mr. Metzger: Turning to Government Exhibit 614 for identification, we come to the first of two exhibits to which counsel for Christiana appears to have some objection.

This document is an attempt to summarize material scattered over four—let me take that back—over five separate exhibits.

It is no more than a mathematical summarization of the facts in these previous documents, and in accordance with the pre-trial order, I am under the impression that these documents are admitted without question by counsel when they are no more than mathematical computations.

I might add one further point on that, that although this might be developed in brief, to clutter up the brief with

this from which further short cuts are going to be made, might inalterably confuse an already complex situation.

The Court: What do you say about the exhibit?

[fol. 2716] Mr. Scott: Your Honor, I do object strenuously to this document. As a matter of fact, it has no probative value.

If your Honor will look at the first page, one of the major classifications is, "Non-family." Already there is an operation of judgment that has been involved, and I may point out to your Honor that as a result of the amended complaint in this very proceeding, family has a very precise meaning in this case, and in those terms these are incorrect.

To that extent they expect this to have any other probative value, this is more than simply a compilation, and there is no competent evidence for any other meaning to that classification.

Then if I may turn a little further, on Page 2 of this brief—I will call it brief—looking down the page, you see the name, Batchelder——

Mr. Metzger: That is a mistake which I intended to point out.

Mr. Scott: This is characterized as "Friend of Irenee du Pont, Jr."

Mr. Metzger: His father-in-law.

Mr. Scott: There is no competent evidence of that.

Next is Charles F. Benzel, friend. There is no competent evidence of that.

Mr. Metzger: Each of those will be brought out to counsels' satisfaction.

Mr. Scott: No. My proposition is that this is not a document that has any probative value, and it isn't simply adding figures together.

[fol. 2717] Mr. Metzger: All right. First, I have noted at the head of the Page 2, to correct this Batchelder situation. He is the father-in-law of Irenee du Pont, Jr.

Mr. Scott: Further, following this down, if your Honor will turn to Page 7, under "Family" on Page 7 is listed, Delaware Hospital, E. I. du Pont de Nemours & Company, (du Pont Company Thrift Plan); The Tower Hill School Association; The Wilmington Society of Fine Arts.

I suggest to your Honor that there is not one scrap of evidence to justify that characterization.

Therefore, I suggest, your Honor, that this is not simply a summarization of the material that he has put in in competent form, but purports to contain evidence that goes far beyond, and to that extent is completely incompetent. I object to it.

Mr. Metzger: May it please the Court, I also object to the characterization of counsel.

I have at the beginning of this conference this morning indicated the definition applied throughout, and this is not the first time the word has been used, the first time the complaint has been raised, but I have characterized what was meant by the word "family."

This is accurate completely, and if it is in any specific instance not accurate, it will be subject to the agreement of counsel to correct the record to indicate that. "Family" has a specific meaning in this context, and in this context it is correct.

Now, counsel is objecting——

Mr. Scott: You are asking to put this into evidence.

[fol. 2718] Mr. Metzger: Counsel has pointed out that in the record of the case, the original case, filed with this Court, the family definition was reached for purposes of determining the existence of conspiracy.

That conspiracy is not in point in this hearing. We are here attempting to determine what effect a given disposition of the stock holdings of the du Pont Company in General Motors will have upon this violation of the anti-trust laws. It, is a completely different definition of family, which is not only warranted but required in order to determine this problem which is compeletly different from a conspiracy count which existed at the trial.

Mr. Scott: Mr. Metzger, I am not arguing with you now, I am talking about evidence. I don't care. You can define "family" any way you want to for purposes of argument, but to put in a document in which you——

Mr. Metzger: The word family is defined and defined accurately, and in any instance where you find an objection, you are free to make a correction.

Mr. Scott: Wait a minute. You are counsel here. You are not testifying. If you have any document that characterizes these people as family and is competent, you can put it in, just as we may put in——

Mr. Metzger: If it please the Court, if I make up a document, I think I may be entitled to define the terms in the document, and if counsel has any objection to the facts I elicit, fine, but counsel may not object to my definitions.

If counsel objects to the probative aspects of the definition, he may argue to that, but I have used "family" to mean one thing, and I think in the context of a hearing on relief that that definition is more valid than to try and define and limit it to a certain group of people.

[fol. 2719] The Court: I will have to read this before I can rule on this, gentlemen.

Mr. Metzger: May I point out with relation to some of the specific objections raised by counsel, if the Court will recall, a number of the documents previously introduced contained some 1050 trust instruments of the Wilmington Trust Company, and another 60 or 70 from the Delaware Trust Company, and another 70 or 80 from the Bank of Delaware.

This is more than taking the Wilmington and Delaware Trust Company groups, and where you might have an individual or a group of individuals as trustee or grantor or adviser of perhaps twenty or thirty of those trusts, taking and putting together each of these trusts as to which they have this factual relation, I think this is a real aid to the Court in solving the problem.

Mr. Scott: May I suggest—I take it to be your position that you are not introducing any additional probative testimony via this document? Is that your position?

Mr. Metzger: My position is that this document is no more than a mathematical computation of the previous documents, and that where a statement is made in this document which counsel feels is inaccurate in the context that I have ascribed to it, I will on demonstration by counsel delete that item.

Mr. Scott: May I say, if this is received in evidence, will you then contend that there is evidence in the record that these people are members of the family by reason of this document?

Mr. Metzger: I don't know what you are driving at.

Mr. Scott: Because you are putting in a document that is supposed to have probative value.

[fol. 2720] Mr. Metzger: This is probative value for the proposition that where I have defined family, I have de-

fined it, that each of the grantors listed are members of that family and that——

Mr. Scott: What family? You haven't even defined it. Presumably you mean family in general.

Mr. Metzger: I have defined it. I defined "family" at the beginning of the morning.

Mr. Scott: But you are not testifying.

Mr. Metzger: I don't have to testify, Counsel,

I have set forth the document in which I have given certain meanings to certain words.

Mr. Scott: Yes, but the ultimate question here is the basic evidence that we are dealing with.

Mr. Metzger: That is correct.

If you feel that there is any mistake of fact, or that this word is not suitably ascribed to each of the names contained therein, I will upon your demonstrating that point, correct it.

Mr. Scott: No. Look, my friend, the problem here is not that. I have no question about the basis of the facts that you have put in through these other documents. They have probative value. They came from some source.

Mr. Metzger: And these come from those——

Mr. Scott: Now, wait a minute.

You put in a document which you prepared, in which you go beyond—I don't care if you add up this number of people, if you go beyond and characterize the relationship, which may be itself an issue, and if you——.

[fol. 2721] Mr. Metzger: You stated——

The Court: May I interrupt to say, as I understand Mr. Metzger's position, he contends that the material in this summary is taken from these other exhibits?

Mr. Scott: That is correct.

The Court: Am I correct, Mr. Metzger?

Mr. Metzger: With one or two exceptions it is. I was going to get to that.

The Court: Those are exceptions that Counsel is talking about. You would have no objection, Mr. Scott, if that were the fact; namely, that this was a summary, an accurate summary on the information the record already contains?

Mr. Scott: If it is an accurate summary.

The Court: Yes, if it is.

Now, I will reserve my ruling, and you confer with Counsel and point out to him where it is inaccurate.

Mr. Metzger: I would like to point out to the Court——

The Court: In the meantime, the Court will reserve its ruling.

Mr. Metzger: I would like to point out where Counsel's objection may find some difficulty.

Turning, for example, to page 2 of that document, the names "Harold S. Schutt, Jr.," and "Charles Porter Schutt." Counsel will object that Charles P. Schutt, Jr. is not contained in any of the previous documents——

The Court: I will hear further discussion after your conference.

[fol. 2722] Court stands recessed now until 2:00 o'clock.

(Whereupon a recess was taken in the above-entitled cause until 2:00 o'clock p.m. of the same day, Monday, April 6, 1959.)

[fol. 2723] Before Hon. Walter J. La Buy, Monday, April 6, 1959, 2:00 o'clock, p.m.

Proceedings resumed pursuant to recees.

Present: Same as before.

ARGUMENT ON MR. CARSON'S MOTION TO VACATE SUBPOENAS.

The Clerk: Case on trial.

The Court: Counsel may proceed.

Mr. Owens: If your Honor please, Mr. Carson and I have discussed this this morning and I have examined the documents that they were able to collect in response to the subpoena. Mr. Carson has indicated to me that he recognizes that this does not constitute all of the documents that are called for. He has some problem which I think he would like to explain to the Court with respect to the leaving of the documents that he does have, that are responsive, with the Court.

I asked him if it would be agreeable to leave them with me but he had some reservations or problems in that regard. I think he would like to address the Court on that subject, your Honor.

Mr. Carson: I do not think I need trouble the Court about that, Mr. Owens. You and I understand each other perfectly well. I have addressed my motion to the Court and not to Mr. Owens to quash the subpoena as oppressive and unreasonable. There was very little notice, almost none, over the week end.

Further, the description is very broad and we cannot tell [fol. 2724] from the description—and I am looking for it and I cannot find the text of the subpoena—what counsel are requesting.

I have, as a matter of coopération with the Court, shown him these documents and he says he is interested in most of them. Finally, I represent to the Court that this underwriting is not completed, that is to say, that while the offering is completed there is a good deal of work to be done by the managing underwriter and I think it might well be prejudicial to the whole affair if there were a wide inquiry at this time on the public record.

Now, I do not know what inquiry counsel wants. He leaves everything vague and he says I am to explain it. Now, your Honor, I have made a motion seriously. I ask leave, if counsel will not take the documents I have been able to bring, in substitution I ask leave to submit my affidavit or the affidavit of the parties, on Wednesday, in support of my motion and ask your Honor to rule on it.

Mr. Owens: In view of the fact, your Honor, that our subpoena calls for one witness to explain the part of these underwriting firms, that Mr. Carson represents as counsel, to explain their role in the underwriting and explain some of the documents—now, the subpoena, in form is a subpoena to testify and "bring with you certain documents."

In response thereto there is no person appearing to testify. Mr. Carson has appeared for the purpose of requesting that the subpoena be quashed. We have no desire to oppress them in any way or to be unreasonable.

We understand because of the schedule of the Court and the desire of all parties to proceed with expedition in this matter that there isn't a lot of time. That does not leave us with any great latitude with respect to the freedom we [fol. 2725] can make in adjusing the time schedule, or what have you, to mitigate the burden that it may impose upon them.

I cannot think that I would be consistent with my obligation if I said, "Well, he has represented that this is a partial compliance," and for me to say, "Well, we will excuse further compliance and the testimony in connection with these documents on the consideration that these may be informally left with the Court."

So I think we should either have a ruling on our motion, or such other modifications as the Court thinks appropriate in the circumstances.

The Court: Well, Mr. Carson, does the Court understand that you are objecting to the Government using these documents that you have brought in, or do I understand you to say that this is as far as you have gone, or as far as you can go for the present?

Mr. Carson: I do not want to abandon my motion, your Honor.

The Court: No. I understand.

Mr. Carson: I want to be co-operative. I know your Honor's trial problem.

My direct answer to your Honor's question is that I have been trying to find out over the telephone to New York which of these documents I could leave here to be photostated. There are a few originals of teletypes that I think are of no importance, that I have told Mr. Owens about. I would take those to New York and photostat them if he wants them. The rest I could leave here to be photostated.

Therefore, the answer is, subject to my motion: Yes, these documents can for the most part be left. I believe, [fol. 2726] Mr. Owens, isn't it true that on your inspection you have shown that you desire to introduce most of them?

Mr. Owens: That is correct.

Mr. Carson: He has examined them during the morning.

The Court: Could we dispose of this motion by agreeing that certain of these documents would be satisfactory so far as satisfying the subpoena is concerned? If not, I will have to hear your motion to quash.

Mr. Owens: Well, there are additional documents which we know they have not had time to fully complete their search. With respect to that, consistent with our Court schedule here, we are agreeable to giving them that time,

as far as we are concerned, but Mr. Carson has a problem of leaving certain originals with us.

I do not know if they are the documents called for in the subpoena. They are here, and they have been produced, but he wants to stand on his motion to quash.

Mr. Carson: Well, your Honor, may I say just one more word?

Will your Honor look at this subpoena that I have handed to the Clerk?

The Court: Hand it to the Clerk.

Mr. Carson: Now this is addressed—I am looking at the one addressed to Smith Barney. The one your Honor has is addressed to Morgan Stanley. It asks, "You and each of you attend—" I supose there are twenty partners in Morgan Stanley, and he claims this is a subpoena ad testificandum. Now isn't that ridiculous?

Apart from that, just look at the documents called for, as I think this is just a documentary subpoena—"all [fol. 2727] studies, reports, analyses, correspondence and memoranda, written, prepared or received by" Morgan Stanley; or in my case Smith Barney, "referring or relating to"—A and B are sufficiently definite, but all studies, and so on, I think, is an imposition on the Court,——

The Court: Well, of course, that is too broad.

Mr. Carson: (Continuing) an imposition on the Court to have a discovery subpoena at the end of a trial. Therefore, I suggest if it's compatible with your Honor's program, to have another deposition in New York, as we had before, so we may know exactly what they want. This one should be quashed.

Mr. Owens: If your Honor please, this relates to a transaction in which there was no way for us to have held a deposition at some previous time, and our capacity in the absence of actually inspecting the documents to define them with the complete precision that we would desire to is one thing. I think this is as near a description of the matters concerning which we want their documentary evidence——

The Court: Do you wish to file some affidavits supporting the motion?

Mr. Carson: Yes, your Honor. I think I should, because I want your Honor to rule on it. It is a serious motion, and I suppose there should be an affidavit of the person subpoened. I will submit it by Wednesday.

The Court: By Wednesday morning.

Mr. Owens: If your Honor please, there is one other word that I would like to say. This is addressed to the managing partner, and it asks that he appear to testify.

Mr. Carson: Morgan Stanley—Smith Barney.

Mr. Owens: If counsel desire, we can issue an ad testificandum subpoena, if that is what they want.

[fol. 2728] Mr. Carson: Let it be clear, your Honor, I have disclosed to Mr. Owens the names of the people, and if they wish any witness, I want him named, because I want him at least to get his travel expense out of the Government.

The Court: If you can agree on an order, very well; otherwise I will rule on it Wednesday.

Mr. Carson: Thank you, your Honor.

The Court: Proceed, gentlemen.

Mr. Owens: In the meantime, are we going to suspend the production of these documents until that time?

The Court: Surely. So the Court ruled.

Proceed.

Offers in Evidence

Mr. Metzger: May it please the court, at the noon recess counsel for Christiana and counsel for the Government agreed on the Government Exhibit 614 and 615 for identification. The term "family" and "non-family" will be extricated from these documents.

The Court: 614 and 615?

Mr. Metzger: Yes, your Honor, and a non-controversial term substituted for each; and where "friend" or "attorney" is listed as a relationship, the grantor and the beneficiary of the document will be indicated.

The Court: 614 and 615 you say?

Mr. Metzger: Yes.

The Court: That leaves——

Mr. Metzger: That leaves Exhibit 616, the last one, which poses several problems.

Counsel for General Motors have objected to the terminology used and formally there is some merit to the objection.

[fol. 2729] Mr. Scott; Mr. Metzger, could I interrupt for just a moment? With reference to 614 and 615, we agreed on certain specific modifications.

Mr. Metzger: Yes.

Mr. Scott: As I understand it, you are proposing to introduce them.

The Court: Subject to the modifications.

Mr. Metzger: Yes.

Mr. Scott: All right.

Mr. Metzger: If the Court will address itself, for example, to the third trust listed on Exhibit 616, it says, "Delaware Trust Company—"

Mr. Tierney: If the Court please—

Mr. Metzger: "Anne Alexandrine du Pont Valk—"

Mr. Tierney: I would like to make an objection. I object to the witness reading anything from Exhibit 616. It has never been offered or identified properly, and I object to his reading from it and serve notice on counsel when he formally offers it that I will then have an objection. But I object to him reading from a document not offered in evidence.

The Court: This is in support of its introduction; he is not testifying.

Mr. Tierney: Well, if he will offer it, then I can make an objection. From this record we have made this morning, I just can't understand what it is. If he offers this exhibit, I will give him an apt objection.

Mr. Metzger: None of these documents have yet been offered.

[fol. 2730] Mr. Tierney: I object to Exhibit 616 on the ground of its authenticity, its accuracy, and its reliability.

Mr. Metzger: Now to return to the third item, your Honor, "Delaware Trust Company and Anne Alexandrine du Pont Valk, trustees for Anne Alexandrine du Pont Valk, granddaughter of Francis Gurney du Pont." Now, none of the relationships in parenthesis are listed in the stockholders list. These are the same relationships we have indicated in all of the other documents as far as family relationships.

I have an agreement with counsel for Christiana as to the accuracy of these relationships, but counsel for General Motors feels that that is not satisfactory for them.

Mr. Tierney: If the Court please, I want to say this.

Mr. Metzger: If you don't want me to finish the presentation, counsel.

Mr. Tierney: Let me say this, your Honor. The stock list of General Motors does not list the family relationships and the friends and the enemies of the stockholders, and I certainly object to the accuracy of this thing.

The Court: It is headed, "Extract from General Motors Corporation."

Mr. Tierney: There is nothing in any record of General Motors that shows who is the grandfather of Francis Gurney du Pont or who is the son of Francis Gurney du Pont, and I object to the exhibit and all parts of it.

Mr. Metzger: In attempting to get the facts into the record, your Honor, I would like to point out what the problems are and any changes that will still put those facts into the record would be satisfactory to the Government. In this item we were just discussing that there were origi- [fol. 2731] nally three truste s listed, the Delaware Trust Company, Anne Alexandrine du Pont and John Hemphill. John Hemphill has since deceased. Anne Alexandrine du Pont has married and her marital name is Valk. These are facts that can be checked.

I suggested to counsel that first we modify the title and say, "General Motors stockholders owning 5,000 shares or more, a list of selected individuals."

Mr. Scott: Your Honor, I wonder if I could make a practical suggestion?

The Court: I am listening.

Mr. Scott: As I understand it, all of the individuals that will appear on the stockholder list will have been identified in some other respect in the record.

Mr. Metzger: Not all.

Mr. Scott: If not, then you and I can get together and identify them.

The Court: I will make a suggestion. I will reserve my ruling on this until after you have had a chance to confer, and maybe we can agree on some modification. The Court will reserve its ruling on Exhibit 616 until after conference of counsel.

Mr. Metzger: I believe there is no objection between counsel for Christiana and the Government. The objection has been raised that these stockholders are not—this is completely improper. I would change the title from "Extract of General Motors Corporation, stockholders owning over 5,000 shares or more" to "Selected persons holding

5,000 or more shares of General Motors Corporation as of November 14, 1957." And subject to that change, I believe that any objections as to the form may be obviated.

[fol. 2732] The Court: The Court will reserve its ruling.

Mr. Metzger: I offer Government's Exhibit for identification 594 through 616 subject to any changes that may be made as to specific items in the factual context that are not accurate. Understanding that the same reservation is matde as to the offer of counsel for Christiana.

Mr. Tierney: I understand that you are reserving your rulings on 616, your Honor?

The Court: Yes, I am.

Mr. Scott: Do I understand, your Honor, that with respect to the extract from the stockholding list of the various other companies that we discussed this morning, do I understand your ruling to be that in that case it is limited to what actually appears on the stockholder list, except for such bracketed material as we might stipulate——

The Court: That is what I ruled before noon.

Mr. Scott: Subject to that, I have no objection.

Mr. Metzger: May we agree here or stipulate that the Longwood Foundation Inc. was formed from the estate or based on the estate of Pierre S. du Pont?

Mr. Scott: I will look into that.

Mr. Metzger: Subject to any change on your part——

Mr. Scott: I am not stipulating anything to that, because I haven't looked into it.

Mr. Metzger: That leaves the question open. I have no objection to counsel's finding the fact.

The Court: I don't think there is a serious objection here. I think we can work that out. In the meantime the Court will reserve its ruling until you agree on the corrections and modifications.

[fol. 2733] Mr. Metzger: I understand the Amicus Curiae, Mr. Dallstream, is going to present a chart demonstrating stockholdings of officers and directors of du Pont, Christiana and Delaware Realty and Investment companies, which will show their stockholdings in each of the companies in question, including General Motors.

Counsel, I believe, for Christiana and for the Government will accept this as a matter of stipulation with merely the point Mr. Dallstream has already assured me is correct, that there is an indication of the individual's name

so that we can make combinations and take out those parties already named in trust instruments and things of that type.

Mr. Dallstream: So that your Honor will understand the situation, we have been trying for many months to get up a correct exhibit to show to your Honor the persons who would, if the suggestion of the Amicus Curiae as to the type of injunctive provisions we feel should be made here were entered, would be affected by it, and the amount of their holdings. That includes the officers and the directors, persons holding certain positions that require them to have relationships with General Motors, their spouses and the members of their family residing in the same household.

We cannot even to date, on the basis of the information assembled—it has been changed from day to day—submit that exhibit.

As soon as you have completed your work with Mr. Scott and have yours in, then I think that within a few hours after that we can put our exhibit in shape and offer it, and it will supplement what you have.

[fol. 2734] Mr. Metzger: I am sure you will find there will be no objection, no changes in the numbers of shares.

Mr. Scott: Well, we will have to check it. But there will be a basis for checking it.

Mr. Metzger: Yes, on all of our work.

Mr. Dallstream: At any rate, your Honor, we will keep working here with the idea of being able to put it in, and it will not hold up the record.

The Court: Very well.

Mr. Metzger: Just one last point, your Honor, on this entire subject.

That is, a series of relationships that I have already discussed with Mr. Scott, and acceptable to Mr. Scott we will merely insert into the record those relationships in a stipulated form, relationships of du Ponts who have married du Ponts.

Mr. Dallstream: Your Honor, I am sorry to interrupt this proceeding again, but it has just been called to my attention that Mr. Metzger made the statement that my exhibit would show the direct holdings of these persons that would be mentioned in our exhibit in General Motors.

It will not. It will show their holdings in du Pont, in Christiana, and in Delaware, and the votes which will be passed through, if there was a complete pass through.

We have not attempted to make any findings or investigation of whatever holdings they might have had directly. But we do expect the injunction to run against all shares held by those people, even though we are not going to supply them in this record.

Mr. Metzger: Well, is there any way you could supply [fol. 2735] them? Since the injunction would run to that, I think it would be appropriate if they could be gotten without any great difficulty.

Mr. Dallstream: What difference does it make? We are showing the major portion.

Mr. Metzger: We don't know that, do we?

Mr. Dallstream: If we are willing to have the shares that they hold outside enjoined, what difference does it make whether it is ten or a thousand?

Mr. Metzger: It might not make any difference if it is ten or a thousand, but if it is a million or five million, it might.

Mr. Dallstream: I think that is getting to the point of being ridiculous, because none of them have any holdings of any consequence except through the du Pont arrangement.

Mr. Scott: Do I understand, Mr. Metzger, that you are resting on this aspect of the case?

Mr. Metzger: Yes, I am, Mr. Scott.

Mr. Scott: If your Honor please, I have just a few additional bits of material to include in the record on behalf of Christiana.

First, I ask the reporter to mark as Christiana Exhibit for identification No. 14, a chart entitled, "Stock Holdings of, (I) Descendants of Brothers and Sisters of P. S. du Pont and, (II) Descendants of Stockholders of 1899 du Pont Company."

(Thereupon said document was marked defendant Christiana Exhibit No. 14, for identification.)

[fol. 2736] Mr. Scott: This exhibit, your Honor, is simply a compilation of, first, the ownership interest of the descendants of the brothers and sisters of P. S. du Pont and

of the descendants of the stockholders of the 1899 du Pont Company, and a breakdown of the beneficial interest in terms of who the grantor, who the trustee, and who the adviser, if any, are.

This is put in, in order to supplement some of the information that was taken from the trust agreements with respect to which the Government has put in some summaries.

I offer in evidence Christiana Exhibit No. 14.

Mr. Metzger: I have no objection to any of Mr. Scott's exhibits, if it please the Court, subject to the same consideration as to correction on discrepancies that he has with respect to ours.

Mr. Scott: I understand, Mr. Metzger.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Defendant Christiana Exhibit 14.)

Mr. Scott: Next I ask the reporter to mark as Christiana Exhibit for identification No. 15, a chart, also entitled, "Stock Holdings of, (I) Descendants of Brothers and Sisters of P. S. du Pont and, (II) Descendants of Stockholders of 1899 Company, Delaware Realty stock.

(Said document was marked Defendant Christiana Exhibit No. 15, for identification.)

Mr. Scott: This is a similar chart with respect to the holdings, both ownership interest and the analysis of the [fol. 2737] beneficial interest, with respect to Delaware Realty stock.

I offer in evidence Christiana Exhibit No. 15.

(Said document, so offered and received in evidence, was marked Defendant Christiana Exhibit 15.)

Mr. Scott: Next, I ask the reporter to mark as Christiana Exhibit for identification No. 16, a chart entitled, "Stock Holdings of, (I) Descendants of Brothers and Sisters of P. S. du Pont and, (II) Descendants of Stockholders of 1899 Company, du Pont stock.

(Thereupon said document was marked Defendant Christiana Exhibit No. 16, for identification.)

Mr. Scott: This is a similar compilation with respect to the du Pont stock held by this aggregation of individuals.

I offer in evidence Christiana Exhibit for identification No. 16.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Defendant Christiana Exhibit 16.)

Mr. Scott: Next, your Honor, I ask the reporter to mark as Christiana Exhibit No. 17 for identification, a letter dated December 19, 1958, addressed to Mr. Wilkie Bushby, from a Mr. Charles L. Smith, Jr.

(Whereupon said document was marked Defendant Christiana Exhibit No. 17, for identification.)

Mr. Scott: This letter purports to show the holdings [fol. 2738] of Christiana, General Motors and du Pont stock of Harvard University, as of December 18, 1958.

I offer in evidence Christiana Exhibit No. 17.

Mr. Reycraft: No objection.

The Court: It is admitted.

(Said document, so offered and received in evidence, was marked Defendant Christiana Exhibit 17.)

Mr. Scott: Next, I ask the reporter to mark for identification a letter dated January 29, 1959, addressed to Mr. Wilkie Bushby, from a Mr. Joseph J. Snyder, vice president, Massachusetts Institute of Technology.

(Thereupon said document was marked Defendant Christiana Exhibit No. 18, for identification.)

Mr. Scott: This letter also states the number of shares and their market value of these three companies as of December 31, 1958.

I offer in evidence Christiana Exhibit No. 18.

Mr. Reycraft: No objection.

The Court: It is received.

(Said document, so offered and received in evidence, was marked Defendant Christiana Exhibit 18.)

Mr. Scott: Next, I ask the reporter to mark as Christiana Exhibit No. 19, a letter dated March 18, 1959, addressed to Mr. Scott, from a Mr. Parker Hall, treasurer, University of Chicago.